

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

379

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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IN THE

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CLERK

United States Court of Appeals for the
District of Columbia

APRIL TERM, 1937

No. 6908

MACPHERSON CRICHTON, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT

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vs.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT

STATEMENT

This is an appeal from a judgment of conviction of violation of Section 809 of the District of Columbia Code prohibiting the procuring of a miscarriage.

The defendant, a practicing physician in the District of Columbia, was indicted on three counts. He was ac-

quitted on Counts 1 and 2, but it is necessary to an understanding of the errors alleged that the three counts should be set forth:

Count One

“The Grand Jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

“That one Theodora I. Charlot, on, to wit, the twenty-second day of May, 1936, was pregnant with child, and that on, to wit, the twenty-second day of May, 1936, and at the District of Columbia aforesaid, one Macpherson Crichton, well knowing the premises aforesaid, unlawfully, feloniously, knowingly, wilfully and with intent to procure the miscarriage of the said Theodora I. Charlot, in and upon the said Theodora I. Charlot, then and there being, did use a certain instrument, to wit, a catheter, the use of said instrument as hereinbefore alleged being not then and there necessary to preserve the life or health of the said Theodora I. Charlot, as he, the said Macpherson Crichton, then and there well knew; against the form of the statute in such case made and provided, and against the peace and government of the said United States.”

Count Two

Count Two is similar to Count 1, word for word, except that instead of alleging that the appellant used “a certain instrument, to wit, a catheter” it alleges that he used “certain means and instruments, the exact nature of which are to the Grand Jurors aforesaid unknown.”

Count Three

Count Three is exactly similar, word for word, to Count 1 except that instead of alleging that the ap-

pellant did use "a certain instrument, to wit, a catheter" it alleges that the appellant did use "certain means the exact nature of which is to the Grand Jurors aforesaid unknown."

The appellant went to trial before a Court and a jury. A motion for a directed verdict, interposing an objection to the introduction of any testimony, was made by appellant's counsel upon the Opening Statement made by the Prosecution. The basis of this motion was the contention that under Section 809 of the District of Columbia Code it must be alleged and proved not that the use of the means or instruments, but that the miscarriage or abortion itself must be not necessary to preserve the woman's life; that the exception in the Statute is aimed not at the use of the means but at the fact of the miscarriage and there being no allegation in any of the Counts of the Indictment that the *miscarriage* was not necessary to preserve the life of the woman and no offer of proof to this effect in the Government's Opening Statement, appellant's motion for a directed verdict should have been granted and his objection to the introduction of testimony sustained. This motion was overruled with exception (R. 15, 16).

Thereupon the appellant went to trial before a Court and jury. At the trial the following motions were made by counsel for the appellant:

1. A motion for a directed verdict at the close of the Government's case, on the same ground as the motion for a directed verdict on the Opening Statement and on the ground of insufficiency of evidence (R. 40).
2. The same motion renewed at the close of the defendant's case (R. 72).
3. A motion to compel the Government to elect as to which Count it wished to submit to the jury (R. 72).

All the above motions were overruled with exception, (R. 40, 72, 72).

The jury acquitted the appellant on Counts 1 and 2 but convicted him on Count 3, (R. 7). Thereupon a motion for a new trial was filed and denied, with exception, (R. 7). A motion in Arrest of Judgment renewing the objection to the validity of the Indictment and on the further ground of the repugnancy of the verdict was made and denied, with exception, (R. 7).

Thereupon, on February 8, 1937, the Court sentenced the appellant to confinement in the penitentiary for a period of one (1) year to eighteen (18) months and revoked his license to practise medicine, (R. 1). Notice of appeal was filed February 9, 1937, (R. 1, 2), and the present appeal ensued.

THE TESTIMONY

The prosecuting witness, Mrs. Theodora I. Charlot, a resident of New York City for the past few years, testified that at the time of the alleged abortion she was a widow, having been married in 1934 and her husband having died in October of 1935. After her husband's death she got a position in New York but was in an upset condition and took to drinking too much. About this time she had sexual relations with a man in her apartment in New York. About the middle of April in 1936 she missed her menstrual period, which was due about April 15th. About the end of April she lost her job, (R. 16).

She communicated with a Mr. Derek Fox whom she had known about six years, who lived at 1623 H Street, N. W., Washington, D. C., and on April 29th came to Washington and stayed with him at his apartment at the above address for about a week, at the end of which time she discussed with him, on several occasions, her condition. As a result of these conversations she went

to see a Dr. Heller, (not the appellant), on May 13th at his office in the 1700 block of K Street. Over objection of the appellant, (R. 16, 17), the witness testified that Dr. Heller examined her, and as a result of her conversation with him she went to see Dr. Crichton, the appellant, the next day, May 14th. She had around \$100.00 when she came to Washington and about \$80.00 when she went to the appellant's office on May 14th. After she was shown into the waiting room she asked him if he would perform an abortion. At this time the witness identified Dr. Crichton as the defendant in the Court room. When she asked him if he would perform an abortion he asked her several questions, according to the witness, among them if she was a Roman Catholic and if she was in touch with her family. She replied "No" to both questions. He also asked her, she said, who was responsible for her condition and how many periods she had missed, to which she replied one and perhaps two, (R. 17, 18). According to the witness the appellant finally agreed to perform the abortion for \$100, saying that the risk was too great to do it for less. She then left his office and returned to Mr. Fox's apartment at 1623 H Street. All the above conversation is supposed to have occurred on May 14th. (R. 18.)

The witness testified she returned to the appellant's office on the morning of May 21st and was admitted by the maid into the waiting room. Later she went into the doctor's office and told him she had the money. The doctor said that he had better examine her. He did so, and, according to the witness, told her that he believed she was pregnant. The witness then said she paid him \$100. The witness also said that on this visit he told her to take a douche and a physic at night and a douche the next morning, and to get a room in a hotel. She testified the appellant told her that she could not go to a hospital with a case of that kind. He told her to return to his office at nine the next morning, and

that she was not to eat any breakfast but was to take a walk after the operation. She testified she was having no hemorrhage or bleeding when she went to his office on the 14th or on the 21st, (R. 18).

She bought some rubber sheeting at Murphy's on F Street, and went back to Mr. Fox's apartment, whom she saw that night. That night she also took the douche and physic and arose about seven the next morning, May 22nd. She was not bleeding and had no hemorrhage from the vagina at that time. She made a telephone call at a drug store and then went to the Powhatan Hotel where she registered under her own name. After reserving her room she went to the appellant's office and was admitted by the maid. There was no one else there at the time. The appellant came down the stairs and went into his office. She went into the operating room behind his office, and he asked her about the douches and physic, which she had taken. She told him that she was staying at the Powhatan Hotel. She took off her underwear and got on the operating table which was an ordinary operating table with two stirrup-like arrangements at the bottom, on each bottom corner. She put her feet in the stirrups which raised her knees. The appellant was washing his hands at this time. According to the witness, he then approached the table, with a metal instrument about 18 inches long, narrow and with a handle on it, in his hands. According to the witness he stood at the bottom of the table where her feet were and inserted this instrument into her vagina. He then adjusted it several times and moved it with a circular motion two or three times while it was inside her. She felt some irritation while the instrument was inside her, which was only a few minutes. She thought he had dilated the vagina, but did not see anything that would have caused the dilation, (R. 19, 20). After he took the instrument out she

laid down on a couch in his office and told him she was having severe pain. He told her that she was not taking it very well, and that she should rest a while. She rested on the couch until about eleven o'clock, and then went to her room in the Powhatan Hotel, put the rubber sheeting over the linen on her bed and went to bed. She was having a good deal of pain at that time, (R. 20).

On the morning of the alleged abortion, May 22nd, the witness testified that prior to the alleged operation she was having no hemorrhage or bleeding from the vagina when she got on the operating table, (R. 20).

The witness said that the appellant telephoned her that afternoon to find out how she felt, she replied that she was feeling very badly and had a great deal of pain. Late that afternoon a hemorrhage from the vagina commenced. The appellant called to see her and she told him about it. He said it was rather unusual but he expected it because she had started having pains so soon. The bed linen was soiled. She did not think she saw him any more that day, but the afternoon of the following day, May 23rd, he called to see her and asked how she felt. She asked him for some sleeping tablets which he gave her. She had asked for a hypodermic, but the appellant replied, according to the witness, that it would hinder the miscarriage, and she thought he merely took her pulse on that visit. Mr. Fox, in whose apartment she had stayed on her arrival in Washington came to see her that afternoon and stayed about half an hour, but she had no other visitors. The next day, May 24th, the appellant called to see her. She felt very badly and when she told him about the pain he gave her some more sleeping tablets. She testified the appellant asked her to conserve any blood clots that she passed. These had started around noon on May 23rd. They were about six inches around

and were discharged fairly frequently. The hemorrhage which started on Friday continued through Sunday, the bleeding being very profuse. Mr. Fox did not call on her Sunday but came to the Hotel to see her on Monday around noon, May 25th. The appellant called to see her while Mr. Fox was there and wanted to know who Mr. Fox was. She introduced him to the appellant as an old friend who understood the situation. She had tried to get out of bed before the doctor came, but could not stand up and when the doctor came she asked him for something to take so she could leave the Hotel that day around noon. The appellant however told her to stay in bed. She gave him some blood clots that she had saved. He flushed them down the toilet, but she did not know whether he had examined them as the bathroom was separate from her bedroom. On this visit he stayed about fifteen minutes, gave her more sleeping powders and told her to use an ice pack, (R. 20, 21).

About two or three o'clock in the morning of May 26th she called him up, told him that she was very ill and suffering much pain and asked him to come to see her, which he did about five minutes later. She told him that she was unable to sleep in spite of the sleeping tablets, and that she was in a great deal of pain. He massaged her abdomen, staying almost an hour. That afternoon, May 26th, he returned about five o'clock and examined her. The housekeeper came to the door while he was there and told the appellant that she was the housekeeper and wanted to know how Mrs. Charlot was getting along, and who the appellant was. The appellant told her that he was Dr. Crichton, and this was all the conversation with the housekeeper that Mrs. Charlot could remember. The appellant massaged her abdomen again, and the blood clots continued. He called again the following day about noon, May 27th, and told her that he had to leave town the next day

and would not be able to attend her further and to make other arrangements. According to the witness, he told her that if she had to go to a hospital not to tell what had happened because it would get them both into a great deal of trouble. He left her some more sleeping tablets. The witness stated that he told her to say if she went to a hospital that she had fallen downstairs or something like that. The appellant stayed only about ten minutes, and this was the last she saw of him. The hemorrhages continued, and the linen on the bed was changed several times, although it was not changed daily, (R. 21, 22).

The Hotel physician, Dr. Rosser, came to her room late in the afternoon of May 27th and Mr. Fox came to see her that day. After Mr. Fox came Dr. Rosser came to her room to make arrangements for her to leave, telephoning Gallinger Hospital from her room. She was carried out on a stretcher and taken to Gallinger in an ambulance. On her arrival at Gallinger she met Dr. Mandy. The witness testified she arrived at Gallinger late in the afternoon or early evening of the 27th, and remained there four weeks. When she left Gallinger she went to the Women's Bureau and remained there until July 25th. She testified she went to Gallinger for the first time on May 27th, where the hemorrhages continued for three weeks. When she went to the Women's Bureau they had stopped. They commenced again about a week after she had been in the Women's Bureau. She returned to Gallinger about three weeks after she had been to the Women's Bureau and remained there on this occasion four days. She then went to New York, (R. 22, 23).

The witness testified that neither before the operation was performed nor afterward during her contacts with the appellant did the appellant at any time suggest that she should go to a hospital, (R. 23).

Going back to the 21st of May, the day before the operation, the witness was positive as to the appellant telling her to take a walk after the operation, that the exercise would hasten the miscarriage. She merely walked from his office to the Hotel. The laxative she took on the night of May 21st was "Ex-Lax". She thought she took only one tablet of it, (R. 23).

On cross-examination by appellant's counsel the witness was referred to her testimony that after her husband's death in October of 1935 she started to drink she admitted she drank before then, but did not say that she drank to excess. She also at one time took drugs for three days, but denied that she still took them. She admitted that she took a dope cure, as she called it, in August or September of 1934 in Dr. Roger's Hospital in New York, and then started drinking again to some extent. She insisted she took drugs only for three days and then took a drug cure. As to whether she acquired the drug habit in three days she said she became ill in three days and did not have the habit. She went to the doctor at that time for the cure because she was ill from taking drugs, heroin. She said she did not use drugs at the present time. She did not drink liquor, at least to excess. During the years 1935 and 36 she did not drink to excess, at least not all the time. She was certain she was not intoxicated when she got off the train at Washington though she had something to drink before she left New York and one cocktail on the train. She was not intoxicated when Mr. Fox met her in the Union Station. She admitted that when she reached Washington she went to Mr. Fox's apartment, which consisted of a living room and a bedroom, and lived there with Mr. Fox from April 28th to May 22nd, when she went to the Powhatan Hotel. She did not work at any time during this period, (R. 23, 24). At different times during Jan-

uary, February and March she had intercourse with various men at her apartment in New York. Mr. Fox visited her once in New York about a week before she came to Washington. She did not ask him to come. (R. 24).

Mrs. Charlot testified that she had about \$100 when she came to Washington. She had quit work on April 15 and had given up her apartment in New York City about April 27th. When she first saw Dr. Crichton on May 14th she observed that the office furniture included a couch or old-fashioned sofa. On this occasion he took a history from her, which he wrote down on a card. She did not tell him that she was divorced but that her husband was dead, nor did she say that she lived in Middletown, New York. She gave her residence as 1623 H Street. She told him about having a slight nausea but not about having cramps. She did not have any cramps that she remembered. She told him she smoked constantly, about one package of cigarettes a day, and about having an abortion performed in New York some three or four years ago. He did not ask if she had interfered with herself, but whether some one else had been interfering with her. There was no bleeding when she went to the doctor's office the day the alleged abortion was performed, May 22nd. She did not take any heroin nor any hard liquor while she was living at Mr. Fox's, (R. 25, 26).

On May 22nd when she took her position on the operating table she saw the doctor with a long metal instrument in his hand. She was lying flat on her back and had a sheet over her, but not over her face. Her knees were flexed up and the sheet was over her knees. The only time she saw the instrument was when the doctor picked it up and walked over to her as she could not see the instrument at any other time on account of the sheet over her knees. She did not know

what a catheter was or whether she had ever seen one. Reminded of her affidavit in the Police Court, (Defendant's Exhibit 1, R. 28), wherein she had sworn that he inserted a catheter into her she said that in the Police Court they described certain instruments to her and asked her what the instrument was, and she had said it might have been a catheter, answering the direct question: "Didn't you swear that it was a catheter?", she said "I don't believe that I swore that it was". She did not believe that she swore before the Grand Jury that the appellant had used a catheter on her, (R. 26, 27).

Prior to May 22nd Dr. Heller had made a vaginal examination of her in his office which took a couple of minutes. The couch she testified she laid down on in Dr. Crichton's office after the alleged abortion was across the room from his desk, not in the operating room or the waiting room. She was not sure whether the doctor had inserted anything else in her besides the instrument she described. She remembered having her vagina dilated, but could not see what happened. She did not know what a bi-manual examination was. During the examination on the 21st the appellant inserted his finger in her vagina and pressed on her abdomen. Dr. Heller did this too when he examined her prior to May 22nd, (R. 27, 28).

Mrs. Charlot testified that she went to some doctors in New York City prior to her coming to Washington but that none of them examined her. She told Mr. Fox that she was pregnant and had to do something about it. As to whether she told him that she was going to have an abortion performed on herself in New York, she did not remember whether she had used those words or not, but that was what she meant, (R. 29).

Mr. Arthur J. Harnett, manager of the Powhatan Hotel, testified that he telephoned the appellant that in

the housekeeper's opinion Mrs. Charlot was in a very serious condition; that the appellant ought to see her and have her moved to a hospital. The appellant replied that he would come over to the hotel very shortly and make arrangements either that day or the following day to have Mrs. Charlot moved to the hospital, (R. 29).

Cross-examined by counsel for the appellant he stated that he did not recall the appellant telling him that he was willing to continue with the case if Dr. Rosser, the Hotel physician, could get the girl to go to the hospital. He recalled that the appellant told him he would arrange to get the girl to a hospital; the appellant did not say that he did not want her to go or that he was afraid for her to go, (R. 30).

Mrs. Mamie Heindl, the housekeeper, testified that one of the maids reported to her that the linen was being soiled in Mrs. Charlot's room. She went up to her room, and the door was opened by the appellant. The housekeeper asked him who he was, and he said "the doctor"; that his name was Dr. Crichton. He did not hesitate to give her his name or in telling her that he was the doctor. He was in his shirt sleeves at the time, (R. 30, 31).

As to there being anything unusual about the bed, there was a piece of brown table cloth, oil cloth, on it. After Mrs. Charlot left the Hotel burned the mattress, (R. 30).

On cross-examination she stated that she returned to Mrs. Charlot's room the following day with Dr. Rosser, the Hotel physician. She discussed with Mrs. Charlot whether she would go to a hospital, and Mrs. Charlot told her she could not afford to go because she did not have the money, (R. 31).

Dr. Marian Thomas Rosser, the Hotel physician, testified that the present case was brought to his atten-

tion by the housekeeper and the manager because of the fact that a lot of bloody linen was coming down from Mrs. Charlot's room. On May 27th he talked with appellant, telling him that the management wanted the appellant to get the patient out of the Hotel. The appellant replied that he had been trying to do so for a couple of days, but that Mrs. Charlot would not go. When the witness insisted that she should go, the appellant replied that he would try again to get her out either that evening or the following morning at the latest, but that if he were unsuccessful he would withdraw from the case. About half an hour later the appellant called him and said that he had again seen Mrs. Charlot, that he thought she ought to go to a hospital but that she would not go. The appellant stated that he would be compelled to leave the city either that evening or early in the morning, would not be able to see the case through and asked the witness if he would see the patient. The witness said he would. He went up and saw the patient who was in bad shape, with a temperature of 101 and a weak pulse, around 130. The principal trouble seemed to be loss of blood, resulting in an ex-sanguinated condition, which manifested itself by the weak pulse, the little temperature and the general pallor of the skin. Subsequently, the witness called Gallinger Hospital, got an ambulance and sent her over there, (R. 32, 33, 34).

Cross-examined by counsel for the appellant the witness stated that the appellant at no time said that he did not want her to go to the hospital or that he was afraid for her to go. The appellant said that he would try again to get her into a hospital, and agreed with him that she ought to go there. The witness discussed with Mrs. Charlot whether she ought to go to a hospital. Mrs. Charlot told him that she could not go because she could not afford to go, and that she was not

going till her boy friend Fox called at six o'clock. It was in this telephone conversation that the appellant stated that he was going to be out of the city the next day and could not see the case through and asked the witness if he could see it through, at which the witness replied that he would, (R. 34).

On re-direct examination by the Government, the witness stated that Mrs. Charlot said she was low in funds. The witness explained to her that if she could not go to a private hospital as a private patient she could go to Gallinger and it would not cost her anything. She did not object very hard about going to Gallinger, though she "did object some", (R. 34, 35).

Dr. Arthur Jennings Mandy, Assistant Resident Physician in Obstetrics and Gynecology at Gallinger Hospital, who admitted Mrs. Charlot and treated her at the hospital testified over the objection of counsel for the appellant, and exception, that in his opinion, which was based partly upon his examination of Mrs. Charlot and partly upon what she had told him, not in the presence of the appellant, Mrs. Charlot had had an abortion, meaning by that an "induced" abortion, i.e., one brought about or procured by the aid of some object and not one which occurs naturally and is a "spontaneous" abortion. He testified that when Mrs. Charlot came to the Hospital she was acutely ill, bleeding from the vagina and suffering from an infection. She had a discharge from the genital organs, which was foul smelling and full of blood clots. He found that her womb was enlarged and the mouth of it opened which was not normally the case. This indicated that something in the womb had come out. He could not tell from the nature of the discharge what that was, i.e., what had come out. As to whether he could tell from her physical condition what had been the cause of the discharge, he could presume but he

could not positively state. The discharge was chiefly clotted blood and the products of infection, such as pus and fluid, (R. 35, 37, 38).

Counsel for the appellant refused to cross-examine the witness, moving to strike out all of his testimony on the ground that his testimony consisted of conclusions, partly arrived at from his examination of the woman and partly from conversations with her not in the presence of the appellant. It was also part of the motion to strike out that his conclusion that an abortion had been performed could not be arrived at from a physical examination alone. Appellant's motion to strike was denied, with exception, (R. 40). This error will be discussed later in the present Brief.

The above completed the Government's case and appellant's motion for a directed verdict made upon the same grounds as the same motion made upon the Government's Opening Statement and also upon the usual grounds of the insufficiency of the evidence being denied, the appellant, Dr. Macpherson Crichton, took the witness stand in his own behalf.

The appellant testified, after giving his education in this country, Heidelberg, Germany; Vienna, Austria; Edinburg, Scotland; his graduating from St. John's College, Annapolis, and from Hahnemann Medical College in Philadelphia in 1898, that he had practised 37 years in the District of Columbia. He was a homeopathic physician and was on the Staff of the National Homeopathic Hospital here for about 20 years, resigning in 1929 in prospect of an eight-month trip around the world and the expectation that he would retire at the time. He hardly recognized the woman in Court as the woman who came to him. When she came to his office she did not weigh more than 85 or 90 pounds, had heavy circles under her eyes and was puffy and dissipated looking. He first saw her in his office on May

22nd; he denied that he saw her on May 14th as he had no office hours that day, which was a Thursday and he always took Thursdays off, and on this occasion went to the Pimlico Race Track. The Thursdays in May were the 7th, 14th, 21st and 28th. On the 7th and 14th he was at the Pimlico Race Track; on the 21st he was at North Beach, Maryland; on the 28th he was at Bedford Springs, Pennsylvania. He denied that he had seen her on the 14th or the 21st, remembering distinctly that he was at North Beach on the 21st with Mr. Gibbs Baker in connection with a deal with him for some real estate there. He had driven down to North Beach, about 40 miles away, to see Mr. Baker, leaving Washington with his wife around 9:30 and returning around four or five, (R. 40, 41).

The first time he saw Mrs. Charlot was on May 22nd about 10:30 A. M. He made a history of her case on his records. She gave her address as the Powhatan Hotel, and stated that she was 23 years of age and divorced. Her appearance was pale, anemic, blond, underweight and highly neurotic. She seemed to be in an agitated situation with dark circles under her eyes, was puffy, highly nervous and constantly smoking in his office. She said that she had been married and had had an abortion some years ago. She complained of nausea and said that she had "wave" cramps in her abdomen. She wanted to be examined. He made the examination and recorded the result. The examination revealed very little more than a very under-nourished, anemic and neurotic woman. The physical findings were negative except for a discharge of whites in the vaginal canal with some blood issuing from the mouth of the uterus. His first examination was what is known as a bi-manual examination. The woman is placed upon an operating table, puts her feet in the stirrups which elevates her knees, you then

drape a sheet over her, placing one gloved hand on top of the abdomen, the other hand is passed into the vagina and you endeavor to palpitate between the two hands the womb and its adjoining organs, the tubes and the ovaries. The examination takes a couple of minutes. After he withdrew his hands he noticed blood on the hand which was introduced into the vagina. When he discovered this he took a speculum, (Defendant's Exhibit 3), and passed it into the vagina, adjusted it, electrified it for examination and taking a pair of dressing forceps, (Defendant's Exhibit 4), swabbed out the vaginal canal. The appellant illustrated with the identical instruments, the method of operation. The examination was done in the examining room, which was behind the consulting room. As to Mrs. Charlot's testimony that she was on the operating table in the operating room, the fact was that she never went into the operating room, and was never on the operating table, (R. 41, 42, 43.)

The white discharge which he discovered, which is associated with a mild streak of blood issuing from the womb, is known as leucorrhea. When he discovered it he wiped the blood off with a piece of cotton, which is held at the end of the dressing forceps. The speculum is simply used to give visibility during the process. The whole operation took from ten to twenty minutes. As to Mrs. Charlot's testimony that after the operation she went into his office and laid down on a couch there, there was no couch at all in his office and never had been one, nor anything that looked like a sofa, (R. 43, 44.)

After the examination he gave Mrs. Charlot some advice, telling her the situation might be momentary or permanent, and advising her to go to her Hotel, go to bed and apply ice and tell him later on how she got on, (R. 44).

A detailed recital of appellant's treatment of the patient need not be given at this place; it will be referred to later in the Brief. It is sufficient to say here that he saw her on eleven different occasions, of every one of which he kept a record, (Defendant's Exhibit 2, R. 49-54). This record, kept on cards and made at the time, shows that in general her condition did not improve. He prescribed an ice pack, which may have been the cause of the bed clothing being soiled, as the ice bag used was old and leaky. He gave her from time to time three adrenalin hypodermics to stop the hemorrhage and some aspirin. Adrenalin would be just the opposite treatment if an abortion was desired, the same is true of using an ice pack. If an abortion was wanted heat would be used, (R. 45).

An examination of her discharge showed that it contained blood clots; they were not very large but there were plenty of them. They could never be as large as six inches around; he never saw a blood clot that big unless in a labor case, (R. 46).

When Mr. Harnett, the Hotel manager, told him that he would prefer to have her leave the Hotel, he tried to get her to go to the hospital, but she refused to do so saying that she had no money. When Dr. Rosser, the Hotel physician, told him that he would like to see her and asked for his consent he gave it readily. The appellant testified that at no time did he use a catheter upon Mrs. Charlot or introduce anything whatever into her body except the speculum and the dressing forceps (Defendant's Exhibits 3 and 4). At no time did he use upon Mrs. Charlot any means or instruments whatsoever or treatment to procure an abortion, (R. 46, 37).

As to her testimony that she came to his office on May 14th and arranged with him to perform an abortion for \$100, after he had demanded \$200, no such

conversation occurred on May 14th or any other time, nor did he ask her whether she was a Roman Catholic. He denied that she ever gave him \$100, stating the only money she paid him was \$10 covering the examination on May 22nd, which was entered upon his card, (Defendant's Exhibit 2, R. 49, 50). He denied that he had ever had any conversation with her relative to her taking a douche and a physic and taking a walk after an operation. He never advised her to go to a Hotel nor to buy any rubber sheeting, nor did he ever tell her that if she went to a hospital not to tell anyone what had occurred but to say that she had fallen down the steps. On the contrary, he repeatedly tried to get her to go to a hospital, (R. 47, 48).

On the question of pregnancy, he did not come to any definite conclusion as to whether she was pregnant or not, there being no way that a doctor can determine with certainty that a woman is pregnant after she has passed one or two periods, the only dependable test being the "mouse" test, and even this is not certain. The first time that pregnancy can be diagnosed with certainty by an examination is around five or six months when the fetus quickens, and you can feel the movements, (R. 55).

On cross-examination the Government attempted to bring out that he was not permitted to practise at Columbia and Providence Hospitals in Washington and had been asked to resign from the Homeopathic Hospital. The appellant explained that a doctor is permitted to apply to the particular hospital for permission to practise in it. As to various hospitals in Washington he had never made any application to them and in recent years had given up practicing in hospitals. As to the Homeopathic Hospital they objected to one case he had there involving a bladder tumor, (R. 56).

He further stated that the speculum, (Defendant's Exhibit No. 3), was much too short to enter into the uterus, and that an abortion could not be performed by the use of the speculum. The dressing forceps were long enough to enter the womb, but no abortion could be produced with it due to its shape. As to producing an abortion with a uterine sound, if it were inserted into a womb and manipulated it was remotely possible that it might cause an abortion, (R. 57, 58).

As to his statement when he examined Mrs. Charlot on May 22nd, his remark that it was "negative" did not mean "negative" for pregnancy but "negative as to diseases of the ovaries and tubes". He could not say whether she was pregnant or not; he made a diagnosis of possible pregnancy. As to her purpose in coming to his office he understood that she was to be examined for potential pregnancy. She wanted to find out whether or not she was pregnant, but he declined to make a positive diagnosis. He thought he told her that she was possibly pregnant, but he could not be sure of it on account of the bleeding. There was nothing particularly alarming about her condition except her general health which was far from good. She was pretty much run-down and very nervous and agitated. The bleeding was not at that time any cause for alarm. He stated that he testified before the Grand Jury that there was nothing alarming about her condition at that time. As to his statement before the Grand Jury that six hours after she left his office she was in the throes of a miscarriage and bleeding profusely, he meant an apparent miscarriage. She denied any interference by herself or others. There were plenty of blood clots in the discharge from her womb, but no membrane or fetus. Her discharge did not exhibit any of the characteristics of the placenta. He asked her to conserve her discharge

in order that he might examine it to see whether there were any portions of the placenta in it. Such products would be almost infinitesimal and difficult to see after only six or eight weeks of conception, (R. 59, 62, 63).

The appellant denied that when Mrs. Charlot asked for a hypodermic he told her it would retard the miscarriage. A narcotic will not necessarily retard a miscarriage. He did not give her the hypodermic which she wanted to ease the pain, (R. 65).

Further questioned by the Government the appellant repeated his testimony relative to asking Mrs. Charlot to conserve her discharge so that he could determine whether she was having a miscarriage, which was the sole purpose. He never found any evidence of it. A fetus from six weeks to two months old would be wrapped up in its membrane and the two together would not be bigger than a guinea keats' egg. It would be a collapsible, gelatinous material, the fetus being from three-quarters of an inch to an inch and one-quarter large but of no formation and of a jelly-like substance. It would be difficult to identify without close scrutiny and a knowledge of what you are hunting for. He looked for it but did not find it, (R. 66).

This completed the examination of the appellant.

Mr. Gibbs L. Baker, a member of the Bar in this city, corroborated the appellant's testimony about his being in North Beach, Maryland, on May 21st. He gave the details of the visit, (R. 67).

Asked on cross-examination how he fixed this date definitely in his mind he said he placed it through the departure, May 31st just ten days after the appellant's visit, of a colored boy who cooked lunch for them that day, (R. 67).

Dr. John Thomas Kelley, Jr., a specialist in Washington in women's diseases for 46 years, Emeritus

Professor of Gynecology at Georgetown University and on the Staff of Providence Hospital and Columbia Hospital for Women, testified for the appellant that it was practically impossible to determine pregnancy where a woman had passed her period once or twice. Possibly skillful physicians are able to tell by the shape and consistency of the uterus after the third month. A laboratory test, the "mouse" test, is used to determine pregnancy when the period has passed but once: it is about 99% definite. You cannot be sure of pregnancy until you feel the movements and hear the fetal heart, (R. 68).

The use of a speculum in making an examination of a woman's vagina is a common practice. The witness had frequently in his experience found a uterus bleeding at the mouth. He would then enquire into the history of the case carefully and endeavor to find the cause. If he could not and was certain there was no pregnancy then he would curette the womb with a little instrument like a finger-nail file. Bleeding of this character might come from a fever tumor, cancer of the uterus, myoma in the top of the uterus or in the cervix. This condition might result from the woman's endocrine glands being out of order. In such a case a woman will bleed and bleed. Mrs. Charlot's symptoms, he thought, might indicate an endocrine condition. The witness identified both of the appellant's surgical instruments and stated that they were common and ordinary instruments used in the Profession. Bleeding at the mouth of the uterus is a very common condition. Anemia and drinking would have some effect upon the bleeding. He doubted it as to drugs, (R. 69, 70).

As to the administration of adrenalin, it might or might not be used in attempting to promote bleeding. Given by mouth it would have little or no effect, but

by hypodermic injection at the place where the bleeding occurred it would frequently stop the bleeding. As to ice, the use of ice retarded bleeding, (R. 70).

Dr. William Sinclair Bowen, a surgeon in Washington for 48 years, educated in Baltimore and in Germany and a specialist in Obstetrics and Gynecology for 30 years, testified that the fact that a woman has passed her period for one month or perhaps for two months was no proof that she was pregnant, in fact there was no infallible test for pregnancy at this period. The "mouse" test in the first two or three months was not infallible, and he had known it to fail in his experience. From four and a half to five months it is possible to establish pregnancy by feeling the active movements of the fetus: up to this time there is no way to establishing it. The witness identified the appellant's instruments, (Defendant's Exhibits 3 and 4), and said he had used them hundreds of times, or instruments of the same general character, and that all physicians used them. It was a common thing, from his experience, to find blood at the mouth of the uterus, and to see it through the speculum. It might be due to a variety of causes, which he enumerated, among them an endocrine condition. Sometimes there was no apparent reason. Treatment would depend upon what you thought was the cause: there were no cast iron rules. It would always be best to tell the patient to go home and go to bed. Sometimes adrenalin is used to stop the bleeding, and ice. Bleeding profusely for four or five days would in no way indicate pregnancy, nor the fact that the mouth of the uterus was somewhat open, or that the uterus was somewhat enlarged. As to a woman passing her period for a month or two months, this is no indication of pregnancy: you cannot prove pregnancy while it exists. A woman has to lose her pregnancy to prove

it. If she loses the fetus and placenta tissue, and you find it, this is proof, but you cannot prove it beforehand. The fact that a woman had bled for four weeks has no bearing on it, (R. 70, 71, 72).

On cross-examination Dr. Bowen repeated that bleeding did not necessarily indicate pregnancy unless you knew the cause of it: there were any number of reasons for it. A physician might think a woman was pregnant but he could not be sure of it, (R. 72).

This concluded the testimony on both sides.

By reason of necessary limitation of space, counsel for appellant have omitted the detailed information as to Mrs. Charlot's condition, which are noted down on appellant's contemporary clinical records. These may be found at pages 49-55 of the Record, and the Court is respectfully referred to them to show the care with which the appellant noted down the symptoms of Mrs. Charlot, the treatment and the appellant's analysis of the situation at the time.

OUTLINE OF ARGUMENT

1. There being no allegation in the Indictment nor offer of proof on the Opening Statement of an essential feature of the offense, i. e., that the *miscarriage*, not the use of "certain means", was not necessary to preserve the life of the patient, the Indictment does not charge an offense within the statute. (Assignment of Error No. 1 (R. 9).)

2. There was no proof of pregnancy. (Assignment of Error No. 7, R. 9).

3. Dr. Mandy's testimony that in his opinion an abortion had occurred based partly on hearsay from the woman and partly on his professional opinion was entirely inadmissible. In addition, there being no conflict in the evidence as to who operated on the woman, it was prejudicial because decisive of the ul-

timate question in the case which the jury alone was there to determine. (Assignments of Error No. 4, 5; R. 9).

4. The Court's refusal to instruct the jury at all on the question of whether the miscarriage or the use of certain means was necessary to preserve the life of the woman, and the burden of proof in regard thereto, was clear prejudicial error, (Assignment of Error No. 8, R. 9).

5. According to appellant the burden of proof was upon the Government to show that the *miscarriage* was not necessary to preserve the life of the woman. But even if appellee is right the burden of proof was upon the Government to show that the use of "certain means" was not necessary to preserve the life of the woman.

There is no proof in the Record that either one was not necessary to preserve the life of the woman, the woman's bare statement that she was in good health the morning of the operation being disproved by the Record, and, in any case, being insufficient and requiring corroboration. (Assignment of Error No. 7, R. 9).

6. The evidence is palpably insufficient to sustain the findings and the Court should have granted appellant's motion for a directed verdict, (Assignment of Error No. 7, R. 9).

7. There was a fatal variance by the verdict on the Third Count alleging the use of "means unknown" to commit the offense. (Assignments of Error Nos. 9, 10, 11; R. 10).

8. Having been acquitted on Counts 1 and 2 the verdict on Count 3 is repugnant, (Assignment of Error No. 11, R. 10).

9. Conclusion: The judgment below should be reversed.

I

**THE INDICTMENT DOES NOT CHARGE AN
OFFENSE WITHIN THE STATUTE**

Count three of the Indictment reads:

“That one Theodora I. Charlot, on, to wit, the twenty-second day of May, 1936, was pregnant with child, and that on, to wit, the said twenty-second day of May, 1936, and at the District of Columbia aforesaid, one Macpherson Crichton, well knowing the premises aforesaid, unlawfully, feloniously, knowingly, wilfully and with intent to procure the miscarriage of the said Theodora I. Charlot, in and upon the said Theodora I. Charlot, then and there being, did use certain means, the exact nature of which is to the Grand Jurors aforesaid unknown, the use of said means as hereinbefore alleged being not then and there necessary to preserve the life or health of the said Theodora I. Charlot, as he, the said Macpherson Crichton, then and there well knew.”

Section 809 of the District of Columbia Code reads as follows:

“809—PROCURING MISCARRIAGE—Whoever with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or if a woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years.”

Even a cursory reading of the above Statute shows that it was intended to denounce the offense of using

an instrument or some means or other upon a pregnant woman with the intent to procure her miscarriage when the miscarriage was not necessary to preserve her life or health. It is only the use of an instrument upon a woman in the particular circumstances described in the Statute, i. e., when the miscarriage is not necessary to preserve her life or health, which is made criminal. It is obvious that the Statute does not and was never intended to create the offense of "procuring a miscarriage", rightly or wrongly, irrespective of the circumstances of the miscarriage. It is only procuring a miscarriage when the same is not necessary to preserve the life or health of the woman which is made the criminal offense. There being no Federal Common Law crimes the indictment must bring the offense within the scope of the Statute otherwise it is void. It would be expected, therefore, that the indictment herein would allege that, the *miscarriage* was not necessary to preserve the life or health of the woman. Instead, the Indictment alleges that the "*use of certain means*" was not then and there necessary to preserve her life. It is appellant's contention that negating the necessity of *using the means* is in no way equivalent to negating the necessity of the *miscarriage*, and hence the Indictment does not, technically or otherwise, come within the scope of the Statute.

Appellant's position can be visualized by considering the Statute: (a) As it appears in the Code; (b) As appellant contends it should read; (c) As appellee contends it should read:

(a) *The Statute As It Appears in the Code:*

"Whoever with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means,

unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years, or if a woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years."

(b) *The Statute As Appellant Contends It Should Read, the Capitalized Words Being Added:*

"Whoever with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when

(THE MISCARRIAGE IS)

necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years, or if a woman or her child dies in consequence of such act, by imprisonment for not less than three years nor more than twenty years."

(c) *The Statute As Appellee Contends Is Should Read, the Capitalized Words Being Added:*

"Whoever with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug or substance whatever, or with like intent uses any instrument or means, unless when

(THE MEDICINE, DRUG, OR SUBSTANCE OR THE USE OF ANY INSTRUMENT OR MEANS IS)

necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or if a woman or her child dies in con-

sequence of such act, by imprisonment for not less than three nor more than twenty years."

It is clear from the above that appellant's interpretation of the Statute and the Government's are poles apart. Appellant's contention is that the Statute being directed against abortion it is the completed act of the accomplished miscarriage which must be alleged and proved to be unnecessary, not, as the Government contends, the mere insertion of an instrument with intent to procure the miscarriage. The insertion of the instrument, even with the intent, is obviously not equivalent to the completed miscarriage. It is a mere preliminary motion, at least as compared to the completed miscarriage. There would always be a *locus penitentiae*. According to the Government's construction of the Statute, it would denounce as a crime inserting an instrument into a woman when a miscarriage was necessary to preserve her life, but the insertion of the instrument was not. Certainly this cannot be what the Statute aims at, the Statute being an ordinary abortion statute, not a statute against medical malpractice. The more it is considered, the more we feel this Court will perceive that the essence of abortion being the lack of necessity of the miscarriage a total absence of allegation that the miscarriage was unnecessary is a total failure to bring the crime within the statute.

The conclusive argument in favor of appellant's contention that the Indictment and proof must negative the necessity of the miscarriage, instead of the necessity of the use of the instrument, is that if the *miscarriage* must be negatived there must be proof of pregnancy, whereas if the exception refers merely to the use of the instrument no proof of pregnancy is necessary. As a result, comparing the two constructions it will be seen that the Government's construction is

broader than appellant's, and the Government thus runs counter to the accepted rule that criminal statutes must be construed strictly. It will be seen too from the present Brief that the Government's construction is contrary to the history and traditions of the law with respect to the crime of abortion. The present Statute is the ordinary abortion statute designed to prohibit ordinary criminal miscarriages. The Government's contention for a different and broader construction would convert it into something other than the traditional abortion statute and make it anomalous. Such a construction, we feel, throws the burden of proving its correctness upon the Government.

The question being one of statutory construction we consider first the history of the present Statute and later the construction placed by State Courts on statutes similar to the present.

History of the Abortion Statute, Section 809, D. C. Code

Section 809 of the Code, (Sec. 33, Title 6, 1929 Code), is Section 809 of the Act of March 3, 1901; 31 Stat. 1322, c. 854. This Act of Congress is simply the District of Columbia Code of 1901. Prior to that time the offense was denounced as follows:

“Sec. 13.—Any person who shall administer, or cause to be administered, to any woman in any condition of pregnancy, any medicine, drug, substance, or thing whatsoever, with the intention thereby to produce a miscarriage by any such woman, or to prevent her from giving birth to the child with which she may be pregnant, or shall use on any such woman any instruments, or any other means for said purposes, shall, in case of the death of said woman by any of said substance

or means, or in case of the death of the child therefrom, be guilty of manslaughter, and be punished, on conviction thereof, by imprisonment at hard labor in the penitentiary of the District, or in any penitentiary used by said District, for a period of not less than four nor more than seven years, and be fined in a sum not exceeding one thousand dollars." (Compiled Statutes, D. C., Abert and Lovejoy, 1894, page 158).

The above is an Act of the Legislative Assembly of the District of Columbia of January 19, 1872, pages 26, 27. It does not seem to have been based on the Maryland law, like so many other District Statutes. The Act of the Maryland Legislature of March 28, 1868, (Md. Laws of 1868, Ch. 179), created an abortion statute along entirely different lines from the present. It prohibits the advertising of any drug or preparation or the use of any instrument, but takes care of the question of necessity to preserve the life of the woman by a proviso to the effect that nothing in the Act shall prohibit a regular practitioner of medicine producing an abortion, when, after consulting another physician he is satisfied that no other method will secure the safety of the mother. This Act repealed a prior Act of the Maryland Legislature of 1867, Ch. 185, Section 11, (Md. Code, Supplement 1861-1867, page 160), which prohibited abortion *eo nomine* but contained a proviso that nothing in the Act should prohibit abortion by a regular practitioner when he deemed it necessary for the safety of the mother and after he had consulted two other physicians. Prior to the last mentioned Act the common law on abortion seems to have been in force in Maryland.

Counsel have examined the reports of the Senate and House Committees reporting the Bill which later became the District of Columbia Code of 1901 which con-

tains the present abortion statute but find no mention in either the reports nor in the debates in Congress of this particular Section or the subject of abortion. The question, therefore, is simply whether the present statute is the ordinary abortion statute, similar in object to the various abortion statutes of the States as construed by their Courts and interpreted by the Encyclopedias, or whether it is broader than these statutes and occupies a field of its own. Appellant's contention is that, being similar in phrasing to the abortion statutes of the various states it must be construed as they have been by the highest State Courts.

The Encyclopedias and Text Books

Corpus Juris:

"Where the offense is an attempt to procure a miscarriage, unless such miscarriage was necessary to preserve life, an indictment alleging the unnecessary employment of a particular instrument to procure that result has been held to be insufficient." (1 C. J. Secundum, page 328).

Ruling Case Law:

"14. Non-necessity to Save Life, etc.—Many of the Statutes which define the crime contain a provision that the act is punishable unless the same is necessary to save life. The authorities generally hold that the indictment must negative such necessity." (1 R. C. L., page 77).

"Where the Statute provides in effect that every person who provides, supplies or administers to any pregnant woman, or procures any such woman to take, any medicine, drug, or substance or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable, the non-necessity to save life is generally considered an essential element of the offense, and the authorities gen-

or means, or in case of the death of the child therefrom, be guilty of manslaughter, and be punished, on conviction thereof, by imprisonment at hard labor in the penitentiary of the District, or in any penitentiary used by said District, for a period of not less than four nor more than seven years, and be fined in a sum not exceeding one thousand dollars." (Compiled Statutes, D. C., Abert and Lovejoy, 1894, page 158).

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"Where the Statute provides in effect that every person who provides, supplies or administers to any pregnant woman, or procures any such woman to take, any medicine, drug, or substance or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable, the non-necessity to save life is generally considered an essential element of the offense, and the authorities gen-

erally hold that the indictment must allege that *the production of the miscarriage* was not necessary to save her life." (1 R. C. L., page 79; italics ours).

Wharton's Criminal Evidence:

"Sec. 1083. Negative averments.—Where, in a Statute, an exception or proviso qualifies the description of the offense, the general rule is that the indictment or information should negative the exception or proviso, and the indictment must always negative exceptions which are expressly made not criminal. In abortion, where it is provided by statute that every person who shall wilfully and maliciously administer to, or cause to be administered, to or taken by, any person any poison or noxious substance or liquid, or who shall use or cause to be used any instrument with the intention of procuring any miscarriage of any woman then being with child, shall be deemed guilty of a felony unless it appears that such miscarriage was procured or attempted by, or under the advice of, a physician or surgeon with intent to save the life of such woman or to prevent serious and permanent bodily injury to her, the indictment must negative these exceptions and *expressly allege that such miscarriage* was not procured or attempted by or under the advice of any such surgeon or physician with intent to save the life of such woman." (11th Edition, Wharton's Criminal Evidence, page 1898, 1899, Section 1083; italics ours).

Justin Miller, Criminal Law:

"If it is necessary to destroy a child in its mother's womb to save the mother's life, it may be done on the ground of necessity. The necessity is also recognized by the statutes * * * the indictment must allege that the *miscarriage* was not necessary to save life." (Justin Miller, Criminal Law, Section 144; italics ours).

Clark and Marshall On Crimes:

“It is no offense at common law to procure an abortion, if it is done in order to save the life of the woman, and is necessary, or reasonably believed to be necessary, in order to save her life. It is generally expressly so provided in the statutes punishing abortion. If the exception is not expressly stated, it must be implied, for the statute must be read in the light of the common law.” (Clark and Marshall on Crimes, Section 292).

State Decisions Specifically Holding That the Indictment and Proof Must Negative the Necessity of the Miscarriage, Not the Necessity of the Use of the Instrument.

*Vermont:**The Statute:*

“A person who wilfully administers or advises or causes to be administered anything to a woman pregnant, or supposed by such person to be pregnant, or employs or causes to be employed any means with intent to procure the miscarriage of such woman, or assists or counsels therein, unless the same is necessary to preserve her life, shall, if the woman dies in consequence thereof be imprisoned in the state prison not more than twenty years nor less than five years, and if she does not die in consequence thereof, shall be imprisoned in the state prison not more than ten years nor less than three years; but the woman whose miscarriage is caused or attempted shall not be liable to the penalties prescribed by this section.” (Public Laws of Vermont, 1933, Sec. 8608).

The charging part of the above statute is identical in essentials with the District Statute. In *State v. Stevenson*, 68 Vt. 529, 530, the Court considered the specific question here presented. The Court held that

the words "unless the same is necessary to preserve her life" referred to the miscarriage, and that an averment to the effect that the "means" were not necessary to preserve the woman's life was not equivalent to an averment that the miscarriage was not necessary. The Court said:

"The purpose of the statute is to suppress, by penal inflictions, the evil of procuring miscarriage, and it prohibits the employment of any means with intent to procure a miscarriage, unless the miscarriage is necessary to preserve the life of the woman. Any other construction would render the exception nugatory. It cannot be said that the thrusting of an instrument into a pregnant woman, who is otherwise in perfect health, is necessary to preserve her life, or that the employment of any of the means commonly used to procure a miscarriage is necessary to preserve her life; but it may be necessary to procure a miscarriage in order to save her life, and the exception provides for such a necessity, and nothing more. Therefore, under the statute, it is an offense to employ means with intent to procure a miscarriage, unless a miscarriage is necessary to preserve the life of the woman; and it is not an offense, if the miscarriage is necessary to preserve her life. If a miscarriage was necessary to preserve the life of the pregnant woman, all acts done with the intent to procure it were lawful; but if unnecessary, criminal. Hence, the acts antecedently charged to have been done or performed upon the alleged pregnant woman by the respondent, with the intent to procure a miscarriage, may be of either character, and are not necessarily criminal, because in none of the counts is it charged that the miscarriage was not necessary to preserve the life of the woman. If all the allegations of the counts should be fully proved, they would not conclusively establish that the respondent was guilty.

"In order to charge an offense under the statute, it is necessary to negative the exception. *State v.*

Stokes, 54 Vt. 179. An averment that the means employed to procure the miscarriage were not necessary to preserve the life of the woman is not equivalent to an averment that the miscarriage was not necessary to preserve her life, and does not negative the exception; and the failure to negative the exception renders the indictment fatally defective." (*State v. Stevenson*, 68 Vt. 530, 531).

To the same effect is *State v. Stokes*, 54 Vt. 179, 181, containing an identical ruling on precisely the same question.

Indiana:

The Statute:

"Every person who shall wilfully administer to any pregnant woman, or to any woman whom he supposes to be pregnant, anything whatever, or shall employ any means with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be punished, etc." (2 G. & H., 469, Sec. 36).

In *Bassett v. State*, 41 Ind. 303, the indictment was exactly like the indictment in the present case, alleging that the defendant employed a certain instrument upon the woman to produce her miscarriage, "the said employment of the said instrument not being then and there necessary to preserve the life" of the woman. The precise question raised in the present case was decided. The Court held the indictment bad, saying:

"We think it was the purpose of the legislature to make, and that the statute does make, the attempt to procure the miscarriage a criminal act, unless such miscarriage was necessary to preserve life; whilst the charge in the indictment makes the offense to consist in the unnecessary employment

of a particular instrument to procure that result, without regard to its necessity.

“Under the indictment in the record before us, the defendant might have been convicted, although the miscarriage, to procure which the instrument was used, was absolutely necessary to save the life of the woman.” (*Bassett v. The State*, 41 Ind. 304, 305).

In *Willey v. State*, 46 Ind. 363, 364, the indictment likewise alleged the use of an instrument to produce a miscarriage “the said employment of the said instrument not being then and there necessary to preserve the life” of the woman. The Court again held the indictment bad for the same reason given above.

To the same effect are:

Willey v. State, 52 Ind. 346;
State v. Sherwood, 75 Ind. 15;
Holland v. State, 131 Ind. 568.

The soundness of the above decisions was recognized by the Legislature which changed the Act in 1905. Instead of the ambiguous phrase “unless the same is necessary to preserve her life” the present abortion statute reads “unless such *miscarriage* is necessary to preserve her life”. (Baldwin’s Ind. Statutes, 1934, Sec. 2428).

Iowa:

The Statute:

“If any person, with intent to produce the miscarriage of any woman, wilfully administer to her any drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life, he shall be imprisoned in the penitentiary for a term not exceeding five years, and

be fined in a sum not exceeding one thousand dollars." (Code of Iowa, 1935, Ch. 569, Sec. 12973).

The above statute like the present Indiana statute leaves no room for doubt that it is the necessity of the miscarriage which must be negatived. As the State Supreme Court held in *State v. Aiken*, 109 Iowa 643:

"The exception contained in the statute is a part of the description of the offense and of the enacting clause embodied in the very section which defines the crime. Indeed, the exception is so incorporated with the prohibitive clause that one cannot be read without the other. In such cases, it is necessary that the indictment negative the exception. *State v. Leeper*, 70 Iowa, 748; *State v. Van Vliet*, 92 Iowa, 476; *State v. Beneke*, 9 Iowa, 203; *State v. Williams*, 20 Iowa, 98. Following these rules, it is generally held that an indictment for abortion must negative all exceptions found in the section of the statute defining the offense. *State v. Meek*, 70 Mo. 355; *State v. Leeper*, *supra*; *State v. Stokes*, 54 Vt. 179; *Beasley v. People*, 89 Ill. 571; *Bassett v. State*, 41 Ind., 303; *State v. McIntyre*, 19 Minn., 93 (Gil. 65); *Commonwealth v. Hart*, 11 Cush. 130." (*State v. Aiken*, 109 Iowa, 644, 645.)

Missouri:

The Statute:

"Any person who with intent to produce or promote a miscarriage or abortion * * * uses upon her * * * any instrument or other method or device to produce a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child), or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose * * * shall, in the event of the death of the said woman or any quick

of a particular instrument to procure that result, without regard to its necessity.

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child upon conviction be adjudged guilty, etc.”. (Revised Statutes Missouri, 1929, Sec. 3991).

It will be noted that the phrase “unless the same is necessary, etc.” is part of a clause substantially similar to the District of Columbia Statute, yet the Missouri Courts have uniformly held that the indictment must allege that the *abortion* was not necessary to preserve the life of the woman.

State v. Schuerman, 70 Mo. App. 518, 521;
State v. Meek, 70 Mo. 355, distinguishing *State v. Van Houten*, 37 Mo. 557;
State v. DeGroat, 259 Mo. 364; also
State v. Shields, 230 Mo., 91, 96.

Not only must the exception as to non-necessity of the *abortion* be alleged but it must be proved, the burden being on the State; *State v. DeGroat, supra*.

North Dakota:

The Statute:

“Every person who administers to any woman pregnant with a quick child, or who prescribes for such woman, or advises or procures any such woman to take any medicine, drug or substance whatever or who uses or employs any instrument or other means with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, is guilty in case the death of the child or of the mother is thereby produced, of manslaughter in the first degree.” (Compiled Laws of North Dakota, 1929, Annotated, Vol. I, Sec. 4116).

This statute is identical in essentials with the District statute.

In *State v. Longstreth*, 19 N. D., 268, 272, the indictment, after alleging that the defendant employed upon

the body of the woman certain instruments with intent to procure a miscarriage, went on to allege "said miscarriage then and there not being necessary to preserve the life" of the woman. The Court held it was not only necessary to allege this exception relative to the necessity of the *miscarriage* but to prove it. The Court stated that by the great weight of authority the State must both allege and prove such negative, i.e., that the *abortion* was not necessary to preserve the life of the woman.

In *State v. Belyea*, 9 N. D., 353, 358, 361, the defendant was charged with murder in the commission of an abortion. The indictment charged that the defendant introduced an instrument into the woman to produce a miscarriage, "well knowing that the use of the said instrument would produce such miscarriage and abortion, and it not being necessary to the preservation of the life" of the woman. As the Court reversed the case on other grounds it did not specifically make a ground for the reversal the question of whether the negative referred to the necessity of the miscarriage or the use of the instrument. On this point the Court said:

"Again, it is essential, in charging the offense defined in the section last cited, to state that a miscarriage was not necessary to save the life of the woman who was operated on. See *Bassett v. State*, 41 Ind., 303; *Willey v. State*, 46 Ind. 363; *State v. McIntyre*, 19 Minn. 93 (Gil. 65). This averment should be made in terms which are direct and certain, nor should it be set out parenthetically or in ambiguous terms. A scrutiny of this information discloses that this material averment, as made, is set out in ambiguous terms, and in a parenthetical clause of the information. From the language employed it will be found difficult to say whether the use of the instrument was unnecessary or

whether the miscarriage was unnecessary. All such parenthetical and ambiguous language is in violation of a settled rule of criminal pleading which demands that all essential averments should be set out in language which is both direct and certain." (*State v. Belyea*, 9 N. D., 361).

In *State v. Reilly*, 25 N. D., 339, 350, the indictment alleged the use of an instrument with the intent to produce the miscarriage of the woman "the same not then and there being necessary to preserve" her life. The Court held that the word "same" both in the statute and in the indictment referred to the word "Miscarriage".

Utah:

The Statute:

"Every person who provides, supplies or administers to any pregnant woman * * * any drug, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable, etc.". (Revised Statutes of Utah, 1933, Penal Code, Sec. 103-2-1).

In *State v. Wells*, 35 Utah, 400, 409, the Court held specifically that under the above statute the burden was on the State to prove that the *miscarriage* was not necessary to preserve the life of the woman, and that this was part of the *corpus delicti*.

Delaware:

The Statute:

"Whoever, with the intent to procure the miscarriage of any pregnant woman or woman supposed by such person to be pregnant, unless the same be necessary to preserve her life * * * shall

use any instrument or other means whatever, * * * or shall aid, assist or counsel any person so intending to procure a miscarriage, whether said miscarriage be accomplished or not, shall be guilty of a felony, etc.''. (Revised Code of Delaware, 1935, Sec. 5171).

State v. Magnell, 3 Pennewill's Del. Reports, 307, 309; 51 At. 606; *State v. Massey*, 2 Boyce's Del. Reports, 501; 82 At. 243; both hold the indictment must negative the necessity of the *miscarriage*. In *State v. Jones*, 4 Pennewill's Del. Reports, 109; 53 At. 858, the Court held that the negative clause in that particular indictment, which is not contained in the report, negatived the miscarriage as well as the giving of the medicine and was sufficient. This decision was followed in *State v. Brown*, 3 Boyce 499; 85 At. 797; to the same effect is *State v. Quinn*, 2 Pennewill, 339; 45 At. 544.

Illinois:

The Statute:

"Whoever, by means of any instrument, medicine, drug or other means whatever, causes any woman, pregnant with child, to abort or miscarry, or attempts to procure or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother's life, shall be imprisoned in the penitentiary not less than one year nor more than ten years; or if the death of the mother results therefrom, the person procuring or causing the abortion or miscarriage shall be guilty of murder." (Jones Ill. Statutes, Annotated, Vol. 7, Sec. 37.015).

In *Beasley v. People*, 89 Ill. 571, the indictment alleged that the defendant caused a miscarriage "it not being then and there necessary to cause such miscar-

riage for the preservation of the life'' of the woman. The Court held that the exception in the Statute as to the necessity of the *miscarriage* must be negatived, and that the indictment in that case did so sufficiently. In *Scott v. People*, 141 Ill. 195, 203, the indictment after alleging the use of a catheter went on to allege that the defendant ''then and there did thereby unlawfully, feloniously and willfully attempt to procure and produce the miscarriage of said Ruth Aument; it not being then and there necessary to procure or produce such miscarriage for the preservation of the life of the said Ruth Aument.'' In *People v. Huff*, 339 Ill. 328, 330, the indictment alleged the employment of a certain instrument to produce the miscarriage of the woman ''it not being then and there necessary to cause such miscarriage for the preservation of the life'' of the woman. All the above are in favor of Appellant's contentions.

Ohio:

The Statute:

''Whoever, with intent to procure the miscarriage of a woman, prescribes or administers to her a medicine, drug or substance, or with like intent, uses an instrument or other means, unless such miscarriage is necessary to preserve her life, or is advised by two physicians to be necessary for that purpose, if the woman either miscarries or dies in consequence thereof, shall be imprisoned, etc.''. (Throckmorton's Ohio Code, 1936, Sec. 12412).

The words ''unless such miscarriage is necessary'', put the meaning of the above statute beyond doubt. In *Moody v. State*, 17 Ohio 110, the Court held that the burden of proving the non-necessity of the *miscarriage* was on the State, remarking that ''it is the pro-

ducing of an abortion in the absence of such necessity, that, upon the theory of the statute, constitutes the offense."

Reported Indictments Negating the Necessity of the Miscarriage Not the Use of the Instrument

Alabama:

The Statute:

"Any person who wilfully administers to any pregnant woman any drug or substance, or uses or employs any instrument or other means to induce an abortion, miscarriage, or a premature delivery, or aids, abets or prescribes for the same unless the same is necessary to preserve her life and done for that purpose, must, on conviction be fined, etc." (Ala. Code, 1928, Sec. 3191).

Trent v. State, 15 Ala. App. 485, quotes an indictment which shows a negative of the necessity of the *miscarriage*, not a negative of the necessity of the use of an instrument.

California:

The Statute:

"Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment, etc.". (Penal Code of California, 1935, Sec. 274).

The California law as noted below with reference to Arizona is in favor of appellant's contentions.

*Georgia:**The Statute:*

“Any person who shall wilfully administer to any pregnant woman any medicine, drug or substance, or anything whatever, or shall employ any instrument or means whatever, with intent thereby to produce the miscarriage or abortion of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall be guilty of a misdemeanor”. (Georgia Penal Code, Sec. 82).

There are no Georgia cases construing this statute, but it seems to read in favor of appellant's contentions, “the same” referring to “miscarriage.”

*Kansas:**The Statute:*

“Every physician or other person who shall wilfully administer to any pregnant woman any medicine, drug, or substance whatsoever, or shall use or employ any instrument or means whatsoever, with intent thereby to procure abortion or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose, shall upon conviction be adjudged guilty of a misdemeanor, and punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.” (Gen. Statutes of Kansas, Annotated, 1935, Corrick, Sec. 21-437).

State v. Miller, 90 Kan. 230, 232, is not clear as to what the indictment negatived. In *State v. Keester*, 121 Kan. 167, 168, however, the indictment for manslaughter committed in the course of an abortion al-

leged that the defendant employed certain instruments upon the woman with the intent to destroy the child, and that "the destruction of such child was not necessary to preserve the life of the woman." As, under *State v. Watson*, 30 Kan. 281, 283, manslaughter in the course of an abortion includes the statutory crime of abortion above quoted, the case last cited is authority for appellant's contentions being a practical construction of the statute.

Michigan:

The Statute:

"Every person who shall wilfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall upon conviction, be punished, etc." (Compiled Laws of Michigan, 1929, Sec. 16741.)

This statute was repealed and reenacted in 1931 (Public Acts, 1931, No. 328), so as to omit reference to the advice of two physicians. It also added the important provision that it was not necessary for the State to prove that no such necessity existed.

The only reported indictment under the old statute is in *People v. Fritch*, 170 Mich. 258, 260, wherein the negative of necessity refers to the miscarriage and not to the use of the instrument.

Minnesota:

The Statute:

"Every person who, with intent thereby to produce the miscarriage of a woman, unless the same

is necessary to preserve her life, or that of the child with which she is pregnant, shall, * * * use, or cause to be used, any instrument or other means, shall be guilty of abortion, and punished, etc.” (Mason’s Minnesota Statutes, 1927, Vol. 2, Sec. 10175).

It is clear from the above that “the same” refers to the miscarriage. It is the Minnesota practice, however, to negative both the necessity of the miscarriage and the necessity of the use of the instrument. See *State v. Owens*, 22 Minn. 238, 239; *State v. Bly*, 99 Minn. 74, 75.

Mississippi:

The Statute:

“Every person who shall administer to any woman pregnant with a quick child any medicine, drug, or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy or kill said child, and shall thereby destroy or kill it, shall be guilty of manslaughter, unless the same shall have been necessary to preserve the life of the mother, or shall have been advised by a physician to be necessary for such purpose.” (Mississippi Code, 1930, Annotated, 1933, Sec. 993).

This statute was only enacted in 1932 and there are no cases under it. Prior to that time the statute omitted the words “unless the same shall have been necessary to preserve the life of the mother and”, so that it permitted any abortion on the advice of a physician. Under the old statute it was held that the indictment must negative the exception relative to advice of a physician, *Ladnier v. State*, 155 Miss. 348, expressly overruling *Smith v. State*, 112 Miss. 802. The liberality of the Mississippi statute prior to the 1932 Amendment seems not to have been induced by any

advanced Soviet views on the part of the Mississippi Legislature but was due to an inadvertent omission in the Mississippi Code Revision of 1906 whereby the words relative to necessity to preserve the life of the mother were left out. Cf. Mississippi Code, 1906, Sec. 1235 with Mississippi Code, 1892, Sec. 1157.

Nebraska:

The Statute:

“Any physician or other person who shall wilfully administer to any pregnant woman any medicine, drug, substance, or thing whatever, or shall use any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall be punished by imprisonment, etc.” (Compiled Statutes of Nebraska, 1929, Sec. 28-405).

Rice v. State, 120 Neb. 641, 647, shows that the indictment must negative the necessity of the miscarriage not the use of the instrument.

Oklahoma:

The Statute:

“Every person who administers to any pregnant woman, or who prescribes for any such woman, or advises or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable, etc.” (Oklahoma Statutes, 1931, Vol. 1, Article 12, Sec. 1834).

In *Williams v. State*, 16 Oklahoma Cr. 217, 182 Pac. 718, 722, the indictment contained an allegation rela-

tive to "the use of some instrument to effect a miscarriage on the said Maud Marshall, said miscarriage not being necessary to preserve the life of said Maud Marshall."

In *Lovejoy v. State*, 18 Okla. Cr., 335, 194 Pac., 1087, the indictment alleged the use of an instrument upon the woman with intent to procure her miscarriage, "the miscarriage of the said woman not being necessary to preserve the life" of the said woman.

In *Adams v. State*, 21 Pac. (2d) 1075, the Criminal Court of Appeals of Oklahoma referred to testimony by the State to the effect that it was not necessary to have the *abortion* performed.

Washington:

The Statute:

"Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life or that of the child whereof she is pregnant, shall * * * use, or cause to be used any instrument or other means; shall be guilty of abortion, and punished, etc." (Pierce's Code, 1933, Washington, Vol. 2, 8740. Abortion Defined. Sec. 196).

In both *State v. Gaul*, 88 Wash. 295 and *State v. Pryor*, 74 Wash., 121, 122, the indictment alleged that the miscarriage, not the use of instruments, was not necessary to preserve the life of the woman.

Wisconsin:

The Statute:

"Any person who shall administer to any pregnant woman, or prescribe for such woman, or advise or procure any such woman to take any medicine, drug or substance or thing whatever, or shall use or employ any instrument or other means whatever, or advise or procure the same to be

used, with intent thereby to procure the miscarriage of any such woman shall be punished by imprisonment in the county jail not more than one year nor less than six months or be fined, etc.”. (Wisconsin Statutes, 1935, Sec. 351.22).

This statute contains no exception whatever.

State v. Law, 150 Wis., 313, charges the offense in the words of the statute and hence is uninformative. However, in *Rodermund v. State*, 167 Wis. 577, it is indicated the exception refers to the miscarriage and not to the use of instruments.

Nevada:

The Statute:

“Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life or that of the child whereof she is pregnant, shall * * * use, or cause to be used, any instrument or other means; shall be guilty of abortion, and punished by imprisonment, etc.”. (Nevada Compiled Laws, 1929, Hillyer, Sec. 10129).

The above statute is similar word for word to the Minnesota statute already quoted. There being no reported Nevada cases on the above Section, the Minnesota decisions holding that it is the necessity of the miscarriage which must be negatived would seem to apply.

New Mexico:

The Statute:

“Any person who shall administer to any pregnant woman any medicine, drug or substance whatever, or attempt by operation or any other method or means to produce an abortion or miscarriage upon such woman, shall be guilty of a felony, etc.”.

(New Mexico, Statutes, Annotated, 1929, Sec. 35-309).

The above statute was enacted in 1919 changing Section 1464 of the Code of 1915 reading as follows:

“Every person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother and shall have been advised by a physician to be necessary for such purpose, shall, in case the death of such child or such mother be thereby produced, be deemed guilty of murder in the second degree.” (*State v. Bassett*, 26 N. M., 477).

The last quoted statute is almost word for word similar to the Michigan Statute, and the Michigan indictment already referred to negating the necessity of the *miscarriage* would seem to apply to the present statute. Under *State v. Bassett*, 26 N. M., 476, the latter case, involving the use of instruments, also holds that it is the *abortion* which must be proved unnecessary.

South Dakota:

The Statute:

“Every person who administers to any woman pregnant with a quick child, or who prescribes for such woman, or advises or procures any such woman to take any medicine, drug or substance whatever, or who uses or employs any instrument or other means with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such woman, is guilty, in case the death of the child or of the mother is thereby produced, of manslaughter, in the first

degree.” (South Dakota Revised Code, 1919, Vol. 1, Sec. 4022).

This statute is identical with the North Dakota statute, under which the Courts have held the indictment and proof must negative lack of necessity for *the miscarriage* not the use of the instrument.

There are no reported cases construing the above provision or giving the form of an indictment.

Arizona:

The Statute:

“Every person who provides, supplies or administers to any pregnant woman * * * any medicine * * * or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to save her life is punishable, etc.” (Revised Code Arizona, 1928, Sec. 4645.)

The Annotation of the Code by the official Code Commissioner refers to 1 California Jurisprudence, 101, which reference, (Arizona law being drawn from California) read in connection with statements by the same authority at page 104-105 indicates that the indictment and proof must negative the *miscarriage*, not the use of the instrument; see also *People v. T. Wah Hing*, 114 Pac. 416, 419, to the same effect.

Idaho:

The Statute:

“Every person who provides, supplies or administers to, any pregnant woman, or procures any such woman to take any medicine or drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two

nor more than five years.” (Idaho Code, Annotated, 1932 official Ed., Vol. 1, Sec. 17-1810).

This statute is similar word for word to the California statute, the Shepard Annotations referring to the California statute and cases construing it. As noted with reference to Arizona and California, the construction of the statute is as Appellant contends.

Montana:

The Statute:

“Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment, etc.”. (Revised Code of Montana, 1935, Annotated, Sec. 11023.

This statute is similar word for word to the California statute. There are no Montana cases construing it but being identical with the California statute, and that statute having been construed as appellant contends the California authorities apply here. See discussion under Arizona, present Brief.

**States Whose Statutes and Decisions Are Supposedly
In Favor of Appellee**

Maine:

The Statute:

“Whoever administers to any woman pregnant with child, whether such child is quick or not, any medicine, drug, or other substance, or uses any instrument or other means, unless the same was done as necessary for the preservation of the mother’s life, shall be punished, if done with in-

tent to destroy such child and thereby it was destroyed before birth, by a fine of not more than one thousand dollars, or by imprisonment for not more than five years; but if done with intent to procure the miscarriage of such woman, by a fine of not more than one thousand dollars and by imprisonment for less than one year, and any person consenting and aiding or assisting shall be liable to like punishment." (Revised Statutes of Maine, 1930, Sec. 9, Ch. 135).

State v. Rudman, 126 Me., 177, 179, at first glance seems to hold in favor of the Government. However, a careful reading of the opinion shows that a different question was involved. The Court said:

"The exception in our statute is written 'unless the same was done as necessary for the preservation of the mother's life'. To what does 'same' refer? The unlawful or overt act prohibited in the administration of medicine, etc., or the 'use of any instrument or other means'. The evil intent essential to the crime charged is stated at the end of the Section to be, 'if done with intent to procure the miscarriage of such woman'. The offense is complete when an overt act is done with the intent defined by the statute, unless the act falls within the exception. Context and phraseology convince us that the phrase 'unless the same was done' finds its antecedent in the unlawful acts enumerated rather in the evil intent which must concur.

"The cases cited by counsel for the respondent as opposed to this view are based on statutes of other states in which the exceptions expressly or by clear implication relate to the necessity of procuring the miscarriage rather than to the means used to that end. In *State v. Stevenson*, 68 Vt. 529, the conclusion that the necessity of procuring a miscarriage must be negatived is based on Section 4247, R. L. 1880, of that State, in which the exception, 'unless the same is necessary to preserve her life', clearly relates to the procurement

of a miscarriage rather than to the particular act which was done in the attempt to accomplish it. *Willey v. State*, 46 Ind. 363, and *Basset v. State*, 41 Ind., 303, supporting a similar rule, are controlled by statutes substantially similar to that of Vermont. The same is true of *State v. Meek*, 70 Mo., 355 and *Hatchard v. State*, 79 Wis. 357." (*State v. Rudman*, 126 Me., 179, 180).

It will be noted that this statute is not really an abortion statute at all but a statute prohibiting the misuse of an instrument upon a pregnant woman. This is shown by the indictment which alleges that the defendant: "feloniously did use a certain instrument, a more particular description being to said grand jurors unknown, in and upon the body of one Jennie Gilbert, a woman then and there pregnant with child, by then and there forcing and thrusting said instrument into the body and womb of the said Jennie Gilbert, it not being necessary for the preservation of the life of said Jennie Gilbert to use said instrument as aforesaid". (*State v. Rudman*, 126 Me., 178).

It can hardly be contended that this indictment would be good in the District of Columbia omitting as it does any allegation whatever that the instrument was inserted with intent to procure miscarriage. No doubt, however, as the Maine Court said, it was good in Maine. Due to the first part of the statute reading "whoever * * * uses any instrument * * * unless the same was done as necessary, etc." the words "same was done" (there being no mention of a miscarriage) clearly refer to the use of the instrument, which is not the case in our statute.

New York:

The Statute:

"A person who, with intent thereby to procure the miscarriage of a woman, unless the same is

necessary to preserve the life of the woman, or of the child with which she is pregnant, either: * * * uses, or causes to be used, any instrument or other means, is guilty of abortion, and is punishable, etc.'". (Cahill's Consolidated Laws of New York, 1930, Chap. 41, Article 6, Sec. 80).

The above statute is similar word for word to the Statutes of Nevada, and Minnesota. The mention of necessity in the first clause clearly refers to the lack of necessity of the *miscarriage*, which is the real gist of the crime. However, the New York Courts, differing from the great weight of authority, hold that it is unnecessary for the State either to allege or prove that the miscarriage was not necessary to preserve the life of the woman.

Bradford v. People, 20 Hun 309;
People v. Hammer, 194 Ap. Div., 712, 714.

In addition to the above, it is only fair to say that in *Maxey v. U. S.*, 30 App. D. C., 63, No. 1780 of 1907, and *Harrod v. U. S.*, 58 App. D. C., 254, No. 4759 of 1928, the indictment negatived both the necessity of the use of the instrument and that the defendant was a licensed physician. In neither case, however, was any demurrer filed, nor was the question as to whether the indictment must negative the necessity of the miscarriage, or the use of the instrument presented to or considered by the Court.

Statutes Omitting the Words "Unless the Same" and Reading "Unless the Miscarriage Was Necessary"

In addition to Iowa and Ohio, whose statutes have already been quoted, in connection with direct adjudications in favor of appellant, the following States specifically provide that it must be the *miscarriage*

which was not necessary, omitting the ambiguous phrase "unless the same":

Colorado:

The Statute:

"6687. Procuring Abortion: Every person who shall, wilfully and maliciously * * * use or cause to be used any instrument of whatsoever kind, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned, etc. * * * unless it appear that such miscarriage was procured or attempted by or under the advice of a physician or surgeon with intent to save the life of such woman, or to prevent serious and permanent bodily injury to her." (Compiled Laws of Colorado, 1921, Sec. 6687).

It is clear from the above that the exception refers to the miscarriage and not the use of instruments.

Kentucky:

The Statute:

"It shall be unlawful for any person to prescribe or administer to any pregnant woman, or to any woman whom he has reason to believe pregnant, at any time during the period of gestation, any drug, medicine or substance, whatsoever, with the intent thereby to procure miscarriage of such woman, or with like intent, to use any instrument or means whatsoever, unless such miscarriage is necessary to preserve her life; and any person so offending, shall be punished by a fine of not less than five hundred nor more than one thousand dollars, and imprisoned in the state prison for not less than one nor more than ten years." (Carroll's Kentucky Statutes, Baldwin's Revision, 1930, Sec. 1219a-1).

The use of the words "unless such miscarriage is necessary to preserve her life" places the meaning of

the Kentucky Statute beyond doubt. There are apparently no published indictments.

Oregon:

The Statute:

“If any person shall administer to any woman pregnant with a child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter.” (Oregon Code Annotated, 1930, Vol. 1, Sec. 14-208).

In *Board v. Eisen*, 61 Oreg., 492, 493, the complaint alleged that the *abortion* was not necessary to preserve the life of the woman. On the other hand, in *State v. Willson*, 113 Oreg., 450, 452, the indictment alleged the use of an instrument with intent to destroy the child, “said use of said instrument not being necessary to preserve the life” of the woman. In *State v. Clements*, 15 Oreg., 237, the headnote states that the burden of proof is on the State to show that the *abortion* was not necessary to preserve the life of the woman. The Opinion, however, (p. 247), is somewhat ambiguous.

Tennessee:

The Statute:

“Every person who shall administer to any woman pregnant with child, whether such child be quick or not, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means whatever, with intent to destroy such child, and shall thereby destroy such child before its birth, unless the same shall have been done with a view to preserve the life of the mother,

shall be punished, etc.". (Williams' Tennessee Code, Annotated, 1934, Article IV, Sec. 10791).

In *Smartt v. State*, 112 Tenn. 539, 547, the indictment alleged the use of an instrument "the said use, application, and employment of said instruments not being done with a view to preserve the life of the mother". The "said use" makes it doubtful on whose side this case is.

Wyoming:

The Statute:

"Whoever prescribes or administers to any pregnant woman, or to any woman whom he supposes to be pregnant, any drug, medicine, or substance whatever, with intent thereby to procure a miscarriage of such woman; or with like intent uses any instrument or means whatever, unless such miscarriage is necessary to preserve her life, shall if the woman miscarries or dies in consequence thereof, be imprisoned, etc.". (Wyoming Revised Statutes, 1931, Annotated, Sec. 32-222).

This statute makes clear that it is the necessity of the *miscarriage* not the use of instruments which must be negatived.

The Following State Has a Statute Similar to the Delaware, Minnesota, Nevada, New York and Washington Statutes Already Quoted, Wherein the Phrase "Unless the Same Shall Be Necessary" Appears Prior to Mention of the Use of the Instrument.

Rhode Island:

The Statute:

"Every person who, with the intent to procure the miscarriage of any pregnant woman or woman

supposed by such person to be pregnant, unless the same be necessary to preserve her life, shall administer to her or cause to be taken by her any poison or other noxious thing, or shall use any instrument or other means whatsoever * * * shall be imprisoned, etc.'". (General Laws of Rhode Island, 1923, Title XXXIX, Sec. 6035).

"Unless the same be necessary" above clearly refers to the miscarriage. There are no reported cases.

**States Omitting Any Mention Whatever of Exception
In Favor of Necessity of Saving the Life of the
Mother.**

In addition to the statutes of New Mexico (present statute) and Wisconsin already quoted above the following statutes omit any mention whatever of necessity.

Connecticut:

The Statute:

"Any person who shall give or administer to any woman, or shall advise or cause her to take or use anything, or shall use any means, with intent to procure upon her a miscarriage or abortion, unless the same is necessary to preserve her life or that of her unborn child, shall be fined not more than one thousand dollars or imprisoned in the State Prison not more than five years or both." (Gen. Statutes of Connecticut, Revision of 1930, Vol. II, Sec. 6056).

Only two prosecutions seem to be reported under this Section:

State v. Carey, 76 Conn. 342, and
State v. Lee, 69 Conn. 186.

Neither case is satisfactory either way.

*Massachusetts:**The Statute:*

"Whoever, with intent to procure the miscarriage of a woman, unlawfully administers to her, or advises or prescribes for her, or causes any poison, drug, medicine, or other noxious thing to be taken by her, or with like intent, unlawfully uses any instrument or other means whatever, or with like intent aids or assists therein, shall if she dies in consequence thereof be punished by imprisonment in the State prison for not less than five nor more than twenty years; and if she does not die in consequence thereof, by imprisonment in the State prison for not more than seven years and by a fine of not more than two thousand dollars." (Annotated Laws of Massachusetts, Ch. 273, Sec. 19).

It will be noted that this statute contains no exception relative to the miscarriage not being necessary, this feature of the crime no doubt being embraced in the word "unlawfully". As would be expected therefore there is no allegation of lack of necessity in the statutory form of indictment prescribed by Chapter 277 of the General Laws of Massachusetts, 1932, p. 3248.

The casualness of Massachusetts criminal pleading is indicated by the fact that although the statute prescribes a higher penalty if the woman dies the State Supreme Court has held that it is not even necessary to allege whether the woman did or did not die. See, *Com. v. Thompson*, 108 Mass., 461.

*Florida:**The Statute:*

"Whoever with intent to procure miscarriage of any woman unlawfully administers to her * * * any noxious thing or unlawfully uses any instrument or other means whatever with a like intent

* * * shall, if the woman does not die in consequence thereof, be punished by imprisonment, etc.". (Comp. Gen. Laws, Florida, 1927, Sec. 7579).

This statute is similar to the Massachusetts Statute (Pub. Stat. Mass., Comp. 1882, Sec. 9, p. 1166), and the English Statute (1 Vict., c 85, Sec. 6) prior to the Statute of 24 and 25 Vict., c 100, Secs. 58-60. There being nothing in the statute relative to necessity, decisions under it would not be helpful.

Louisiana:

The Statute:

"Whoever shall feloniously administer * * * to any woman pregnant with child any drug, potion or other thing for the purpose of procuring abortion, or a premature delivery, or whoever by any means whatsoever shall feloniously procure abortion or premature delivery shall be imprisoned, etc.". (Louisiana Code of Criminal Procedure, Sec. 1281).

This statute is so unlike the present, containing as it does no exception relative to preserving life, as not to be in point herein. *State v. Mauvezin*, 130 La., 746, seems to be the only reported case under it.

New Hampshire:

The Statute:

"If any person shall wilfully administer to a pregnant woman any medicine, drug, substance or thing whatever, or shall use or employ any instrument or means whatever, with intent thereby to procure the miscarriage of such woman, he shall be imprisoned, etc.". (Public Laws, New Hampshire, 1926, Ch. 392, Sec. 12).

There being no exception in the statute relative to necessity to preserve the life of the woman the statute

is not helpful. There are no reported decisions under it.

New Jersey:

The Statute:

“Any person who maliciously or without lawful justification, with intent to cause or procure the miscarriage of a woman then pregnant with child, * * * shall use any instrument or means whatever * * * shall be guilty, etc.”. (Compiled Stat., New Jersey, 1911, Title Crimes, Sec. 119).

This statute is so radically different from our own as not to be in point. There is nothing in the statute relative to necessity, that feature of the crime being covered by the phrase “without lawful justification”. The indictment must allege this, 30 N. J. L., 422, *State v. Drake*.

Pennsylvania:

The Statute:

“If any person, with intent to procure the miscarriage of any woman, shall unlawfully administer to her any poison, drug or substance whatsoever, or shall unlawfully use any instrument, or other means whatsoever, with the like intent, such person shall be guilty of felony, and being thereof convicted shall be sentenced to pay, etc.”. (Purdon’s Pennsylvania Statutes, Annotated, Permanent Ed., Title 18, Sec. 2072).

It will be noted from the above that the statute contains no exception with reference to necessity, and so the indictment need make no charge relative thereto. In practice in Pennsylvania the indictment contains nothing relative to necessity.

Mills v. Com., 13 Pa. 631;

Com. v. Demain, 3 Pa. Law Journal Reports, 487.

*South Carolina:**The Statute:*

“Any person who shall administer to any woman with child, * * * or who shall use or employ any instrument * * * with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life, shall, in case of the death of such child or of such woman, be punished, etc.”. (South Carolina Code, 1932, Title 21, Sec. 1112).

The above section applies only when the abortion results in death. There are no reported cases giving an indictment under it. The State has another abortion statute where no death results reading as follows:

“Any person who shall administer to any woman with child any drug * * * or shall use or employ any instrument * * * with intent thereby to cause or produce the miscarriage or abortion or premature labor of such woman, shall be punished, etc.”. (South Carolina Code, 1932, Title 21, Sec. 1113).

It will be noted that there is no exception in this latter statute relative to necessity to preserve the life of the woman. There is no need, therefore, for the State to allege or prove the exception.

*Texas:**The Statute:*

“Article 1119—Abortions: If any person shall designedly administer to a pregnant woman * * * any drug or medicine or shall use towards her any violence or means whatever, externally or internally applied, and thereby produce an abortion, he shall be confined, etc * * *. By ‘abortion’ is meant that the life of the fetus or embryo shall be destroyed in the woman’s womb or that a pre-

mature birth thereof be caused.” (Complete Texas Statutes, 1928, Penal Code, Article 1191).

“*Article 1196—By Medical Advice:* Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.” (Complete Texas Statutes, 1928, Penal Code, Article 1196).

There being no exception in the statute itself, the provision relative to the necessity of preserving the life of the mother being found in an entirely different Section, an indictment for abortion in Texas need not negative any question of necessity to preserve the life of the woman, *State v. Rupe*, 41 Tex. 33, 34.

Virginia:

The Statute:

“If any person administers to, or causes to be taken by a woman, any drug or other thing, or use any means with intent to destroy her unborn child, or to produce abortion or miscarriage, and thereby destroy such child or produce such abortion or miscarriage, he shall be confined in the penitentiary not less than three nor more than ten years. No person, by reason of any act mentioned in the foregoing part of this section, shall be punishable where such act, done in good faith, with intention of saving the life of such woman or child.” (Virginia Code of 1930, Annotated, Sec. 4401).

There are no cases under the above statute which is so radically different from our statute as hardly to be of assistance.

West Virginia:

The Statute:

The West Virginia Statute is identical, word for word, with the Virginia Statute containing a saving

clause in a separate sentence to the effect that "no person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child". The Statute is not, therefore, in point, and there are no decided cases construing it.

England:

The Statute:

"Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life." (The Complete Statutes of England, Classified and Annotated in Continuation of Halsbury's Laws of England, Vol. 4, 60, (1694)).

This statute contains no exception relative to necessity and so is not in point.

Canada:

The Statute:

"Everyone is guilty of an indictable offense and liable to imprisonment for life, who with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any drug or other noxious thing, or unlawfully uses on her

any instrument or other means whatsoever with like intent.” (Revised Statutes of Canada, 1927, Vol. 1, Sec. 303).

It will be noted that the above statute contains no exception relative to preserving the life of the woman. Section 306, however, which denounces the offense of causing the death of a child which has not become a human being, contains a separate sentence as follows:

“No one is guilty of any offense who, by means which he in good faith considers necessary for the preservation of the life of the mother of the child, causes the death of any such child before or during its birth.”

No cases are reported under either section.

Anomalous Statutes, Not Helpful

Arkansas:

The Statute:

“If any physician or surgeon or other person engaged in the practice of medicine shall commit the crime of abortion, or aid or abet in the commission thereof (provided, this section shall not apply to any abortion produced by any regular practicing physician for the purpose of saving the mother’s life) he shall be adjudged guilty of a felony, etc.”. (Digest, Stat., Arkansas, 1921, Sec. 8280).

There are no decisions under this statute, but it is clear from a reading of the statute, that the dominant thought, as in our statute, is to penalize abortions when not necessary to save the mother’s life, not to penalize unnecessary use of an instrument upon a pregnant woman.

*Maryland:**The Statute:*

“Any person who shall knowingly advertise * * * any pamphlet, printed paper, book * * * or any instrument or means whatever for the purpose of producing an abortion, or who shall knowingly sell * * * any instrument of any kind whatever for the purpose of causing the miscarriage or abortion of any woman pregnant with child, at any period of her pregnancy * * * or who shall knowingly use or cause to be used any means whatsoever for that purpose, shall be punished, etc.; provided however that nothing herein contained shall be construed so as to prohibit the supervision and management by a regular practitioner of medicine of all cases of abortion occurring spontaneously * * * or the production of abortion by a regular practitioner of medicine when, after consulting with one or more respectable physicians he shall be satisfied that the fetus is dead, or that no other method will secure the safety of the mother.” (Annotated Code of Maryland, Bagby, Article 27, Sec. 3).

As already noted in the present Brief, (p. 32), the Maryland Statute is so radically different from our statute as to be of no value in construing it, though its prohibition of abortion *eo nomine* shows that the public evil the Maryland Legislature was concerned with, like the other State Legislatures, was the prevention of unnecessary miscarriages, not the prohibition of the misuse of instruments upon pregnant women.

*North Carolina:**The Statute:*

This State has two abortion statutes. In the first statute it will be noted that there is an exception rela-

ive to necessity to preserve the life of the mother; no such exception appears in the second statute which carries a lighter punishment.

“Destroying Child; Intent. If any person shall wilfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy said child, unless the same shall have been necessary to preserve the life of such mother, he shall be guilty of a felony, and imprisoned, etc.” (Jerome’s Criminal Code and Digest of North Carolina, 5th Edition, Sec. 11 (4226)).

“Procuring miscarriage; Destroying Pregnant Woman; Intent. If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise or procure such woman to take any medicine, drug or any thing whatever, with intent thereby to procure the miscarriage of any such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be guilty of a felony, and imprisoned, etc.” (Jerome’s Criminal Code and Digest of North Carolina, 5th Edition, Sec. 12 (4227).)

The first statute above quoted seems not to be an abortion statute, strictly speaking, but a statute directed against the use of any instrument “to destroy said child”. There are no decisions as to whether the exception refers to the use of the instrument or the destruction of the child or both. The indictment in the only reported case, *State v. Martin*, 182 N. C., 846, charges the offense of administering a drug in the words of the statute, with no indication as to what “the same not being necessary” refers to.

Under the second statute the overt act need not be charged and there is, of course, no need to negative the question of necessity, that being omitted from the statute.

Recapitulation of State's Statutes and Decisions

The following twenty-five States have statutes containing the ambiguous words "unless the same is necessary" after mention of the intent and the use of the instruments: Alabama, Arizona, California, Connecticut, Georgia, Idaho, Illinois, Indiana, Kansas, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah and Vermont.

The following States have statutes similar to the Delaware statute containing the negative of the necessity prior to the mention of the use of the means, as in the Delaware statute: "Whoever, with the intent to procure the miscarriage of any pregnant woman, unless the same shall be necessary to preserve her life * * * shall use any instrument or other means whatever: Delaware, Minnesota, Nevada, New York, Rhode Island and Washington.

The following States have statutes similar to the Colorado statute wherein the negative in so many words refers to the miscarriage: "Unless it appears that such *miscarriage* was procured * * * to save the life" of the woman: Colorado, Iowa, Kentucky, Ohio and Wyoming.

The following States contain statutes wherein there is no mention at all of any excepting clause relative to the necessity of saving the life of the mother or the child: Florida, Louisiana, Massachusetts, New Hampshire, New Jersey, New Mexico (present statute),

Pennsylvania, South Carolina (lesser grade of offense), Texas, Virginia, West Virginia, Wisconsin, England and Canada.

As already noted Maryland and Arkansas have statutes containing an unusual form of exception in favor of abortions necessary to save the life of the woman. Their provisions are anomalous and not helpful in the present case.

Cases in Favor of Appellant

In the following States there are specific decisions, already cited, holding that it is the lack of necessity of the *miscarriage*, not the lack of necessity of the use of the instrument, which must be alleged and proved: Delaware, Illinois, Indiana, Iowa, Missouri, North Dakota, Ohio, Utah and Vermont. In addition to cases in the above States definitely ruling on the question actual indictments reported in cases in the following States and cited in the present Brief, *supra*, under the heading of the particular State allege the lack of necessity of the *miscarriage* not of the use of the instrument: Alabama, California, Kansas, Michigan, Minnesota, Nebraska, Oklahoma, Washington and Wisconsin. Inferentially Nevada should be added to the above as its statute is the same as Minnesota; also New Mexico as its statute is the same as Michigan; also South Dakota as its statute is the same as the statute of North Dakota. As is well known the States of Arizona, Idaho and Montana have modeled their law on that of California, and their abortion statutes are identical with the California law. These States should likewise be added to those favoring appellant as the California Courts have specifically held there must be allegation and proof of the necessity of the *miscarriage*, not of the use of the instrument.

Cases Supposedly Against Appellant

The only States wherein Courts have specifically decided that there need be a negative merely of the necessity of the use of the instrument, not of the miscarriage itself, are Maine and New York. A reference to the Maine statute shows that the statute is radically different from the statute of this District. It states:

“Whoever administers to any woman pregnant with child, * * * or uses any instrument or other means, unless the same was done as necessary for the preservation of the mother’s life.”

It will be noted that in this statute there is no mention whatever of the word miscarriage or abortion. The exception relative to necessity, therefore, could not possibly apply to miscarriage or abortion but clearly refers to the use of the instrument, and this is what the Maine Court held in *State v. Rudman*, 126 Maine, 177, 179, distinguishing authorities in other States on the ground that the Maine statute was radically different. (See present Brief, pp. 54-56).

In New York the Courts reached the conclusion that from an evidentiary viewpoint, the disproof of necessity was a matter peculiarly within the knowledge of the defendant, and so the State did not have to *prove* the lack of necessity at all, whether of the miscarriage or the use of instruments. Having come to this conclusion that no proof at all on the question of necessity need be offered by the State, but that this was a matter of defense, naturally the indictment needed no allegation, one way or the other, on the question of necessity. This conclusion of the New York Courts in an old case, *Bradford v. People*, 20 Hun 309, has been followed ever since; see *People v. Hammer*, 194 App. Div., N. Y., 712, 714. The New York ruling is opposed to the overwhelming weight of authority. A case show-

ing its fallacy is *State v. Clements*, 15 Oreg. 237, 247, wherein the Court shows succinctly that the relative convenience of the parties to make the proof can not overturn the State's burden of proof in a criminal case.

In Tennessee there are no adjudicated cases on the point, but one indictment there given in *Smartt v. State*, 112 Tenn. 539, 547, negatives the use of the instrument in the words "the said use, application and employment of said instruments not being done with a view to preserve the life of the mother." This is possibly an authority for the Government.

Unsatisfactory Cases

As will be noted under Connecticut the two cases there are not completely satisfactory either way. In North Carolina the only reported case under the first statute simply charges the offense in the words of the statute with no indication as to what "the same not being necessary" refers to. In Oregon one indictment alleged the lack of necessity of the miscarriage; another the lack of necessity of the use of the instrument. A third case holds, however, that the burden of proof on the State was to show that the *abortion* itself was not necessary to preserve the life of the woman.

General Conclusions

Counsel have been at some pains to collect the statutes of the 48 States and the decisions on them in order to throw any possible light upon the District statute, which is certainly extremely ambiguous. Without laboring the point too far we feel that the State statutes show everwhelmingly that the public evil sought to be remedied, the criminal act against which the statute is levelled, is the causing of abortion where the *abortion itself* is not necessary to preserve the life of the

woman. This seems to be common sense and to be in line with the general history and tradition of the law in this respect. One thing seems certain: the construction contended for by the Government is manifestly a broader construction than appellant's, for under the Government's construction if it is only necessary to allege and prove that the use of the instrument was not necessary to preserve the life of the woman there is no need to prove pregnancy, the reason being that proof as to miscarriage presupposes proof of pregnancy. As construed by the Government, therefore, the burden of proof upon the Government is much lighter than if the statute is construed as appellant contends, and seems contrary to accepted canons of construction relative to penal statutes. It should be noted that in the present case the Judge instructed the jury that pregnancy must be proved. (R. 75-76.) The anomalous situation, therefore, results that unless appellant is right and the indictment must negative the necessity of the miscarriage, the Court in the present case has instructed the jury that it must find proof of what has not even been alleged. It should also be remembered that the trial Court denied appellant's prayer No. III, Subdivision D, (R. 73), instructing the jury that it was an element of the offense which must be proved beyond a reasonable doubt that the *miscarriage* was not necessary to preserve the woman's life or health.

The broad construction contended for by the Government is contrary to a long line of cases holding that penal statutes under the Fifth and Sixth Amendments to the Constitution must describe the acts denounced with such reasonable clearness that one who reads may know what is prohibited and what is permitted. A penal statute so indefinite that a reasonable man reading it would not know what is right and what is wrong under it is simply void.

International Harvester Co. v. Kentucky, 234 U. S. 216;
United States v. Cohen Grocery Co., 255 U. S. 61;
Ward & Gow Co. v. Krinsky, 259 U. S. 503, 510;
Fiske v. Kansas, 274 U. S. 280, 285;
Cudahy Packing Co. v. Parramore, 263 U. S. 418;
Dahnke & Walker Milling Co. v. Bondurant, 257 U. S. 282, 288;
St. Louis R. Co. v. Wynne, 224 U. S. 354, 359;
Collins v. Kentucky, 234 U. S. 634.

As the Supreme Court said in *United States v. Brewer*, 139 U. S. 278, 288:

“Laws which create crimes ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.”

To the same effect is:

United States v. Reese, 92 U. S. 214, 219, 220;
Todd v. United States, 158 U. S. 258, 282;
United States v. Sharp, Fed. Cas. No. 16,264;
Chicago & N. W. R. Co. v. Dey, 35 F. 868, 876;
Tozer v. United States, 52 F. 917, 919, 920;
United States v. Capital Tr. Co., 34 App., D. C., 592.

It follows inevitably from the above that the indictment, omitting as it does any allegation that the miscarriage itself was not necessary to preserve the life of the woman, has failed to charge an offense under the statute and is therefore fatally defective.

II

THERE WAS NO PROOF OF PREGNANCY

As already noted, although the trial Judge consistently refused to accept appellant's interpretation of the statute to the effect that the indictment and proof must negative the necessity of the *miscarriage*,

not the necessity of the use of the instruments or means, denying all of appellant's motions to this effect and refusing appellant's request for an instruction so outlining the offense, he instructed the jury that they must find pregnancy before they could find anything else. The Court said:

"Now, the first thing that you must determine in this case is whether or not the complaining witness, the Charlot woman, was pregnant with child, and the next is whether or not the defendant Crichton procured a miscarriage either by an instrument or by giving of drugs or medicine, or by any other means whatsoever. If you find that this Charlot woman was not pregnant with child, then you need go no further. Your verdict should be not guilty." (R. 75.)

What evidence therefore is there relative to the woman's pregnancy?

The woman, Mrs. Charlot, a woman of admittedly dissolute life, a drinker and dope addict, testified that she had had intercourse with various men in New York at different times during January, February and March of 1936; that about the middle of April in 1936 she missed her menstrual period which was due about the fifteenth of that month, (R. 16, 24), and that she went to see the appellant to get him to perform an abortion on May 14, 1936, (R. 17). According to her (denied by the appellant), the appellant told her that he believed that she was pregnant, (R. 18). She testified that she was not bleeding from the vagina until she was operated on by the appellant, (R. 18, 19), but that shortly afterwards a hemorrhage commenced and that on Saturday, May 23, 1936, she started passing blood clots six inches around, and that the bleeding was very profuse from Saturday noon until she was taken to the hospital the following Wednesday night.

She testified straight-forwardly that the appellant had asked her to conserve any blood clots; that she did so, and that he flushed them down the toilet, but she did not know whether he had examined them or not. (R. 20-21.)

This was the woman's testimony on direct examination. We submit that when she testified that she passed blood clots "six inches around", and that they were discharged fairly frequently, and followed this up by testifying that the appellant asked her to save them, this should have been the end of the case in the jury's mind. Blood clots six inches around would be one and a half times as large as an ordinary baseball and the woman was a very small woman, weighing 97 pounds, (R. 20). The testimony is incredible and is rendered more incredible by her further testimony that the appellant, if he was actually performing an abortion upon her, asked her to save them. The blood clots continued from Saturday noon until the following Tuesday night, (R. 20-22).

On cross-examination, the woman further testified that she had never had an examination made of her at or about the time of her alleged pregnancy by any doctors although she had gone to them. She testified that she had told her friend Mr. Fox, with whom she lived while in Washington, that she was pregnant, and that she was going to have an operation performed on herself in New York, (R. 29).

We note in passing the woman's further incredible statement that although, according to her, she thought she was pregnant and went to various doctors, unquestionably with reference to her pregnancy, (if her story was true), she never had a single one of them examine her and not a single one told her anything about whether she was pregnant or not. (R. 29)

This is all the positive testimony for the Government that the woman was ever pregnant, with the exception of the testimony of Dr. Mandy who admitted her to Gallinger Hospital. His testimony, admitted over the objection of appellant and probably the testimony upon which the jury convicted the appellant, was to the effect that, basing his testimony on his physical examination of the woman and the history which she gave him at the time, he was of the opinion that an abortion had been committed. The error of the Court in admitting this testimony of Dr. Mandy will be made the subject of the ensuing point in the present Brief. As will be shown therein Dr. Mandy was permitted to give his opinion about the ultimate fact in the case which was solely a question for the jury. In addition, his testimony permitted the hearsay statements of the woman, not in the presence of the appellant, to be gotten into evidence on the theory that they fortified the opinion of the witness; also the doctor testified not as an expert witness but gave his opinion not upon what he found alone and what he concluded from his professional experience but with the added element of what someone else told him.

As against the testimony of the prosecution on the question of pregnancy the appellant, likewise a physician, testified that she was not in good physical condition when she came to him on May 22nd; that she was pale, anemic, underweight, highly neurotic, and in an agitated condition, with dark circles under her eyes, puffy in appearance, highly nervous and constantly smoking cigarettes. She had already had one abortion. On his very first examination he found a discharge of whites in the vaginal canal with blood issuing from the mouth of the uterus, (Leucorrhea). (R. 42). At this very time the appellant asked her if she had interfered with herself, (R. 44). As to whether

she was pregnant he testified that he did not come to any definite conclusion about it. When a woman has only passed one or two periods, he stated, the only dependable and reliable test for pregnancy is the so-called "mouse" test, which after the sixth week of pregnancy usually gives a dependable answer. This test is made by taking the morning urine of the woman and injecting it into a mouse which, if the woman is pregnant, results in a congestion of the female organs of the mouse. It takes about a week to get the result of this test. This is the only way to determine pregnancy prior to the time the fetus quickens which is in five or six months, (R. 55, 56).

This was precisely the testimony of the appellant's expert witnesses. Dr. John Thomas Kelley, an expert in obstetrics and gynecology in this city for over 46 years, stated that it was practically impossible to tell whether a woman was pregnant when she had only passed her period once or twice, and that you could not be sure of it until the fetus quickened and you could feel its movements and hear the heart beat. Possibly after the third month a skillful physician could detect pregnancy by the shape and consistency of the uterus. Aside from this the only certain method of determining it was the "mouse" test, (R. 68).

Appellant's other expert witness, Dr. Sinclair Bowen, an expert in obstetrics and gynecology for 48 years testified to the same effect. Even the mouse test he had known to fail. He said that after four and a half or five months it was possible to determine as a fact that a woman was pregnant by feeling the active movements of the fetus. Up to that time there was no way to prove it. He showed that the fact that she had been bleeding profusely for four or five days was no indication that she was pregnant, nor did the fact that the uterus was somewhat enlarged show it. He

said that you could not prove pregnancy while it exists for a woman would have to lose her pregnancy to prove it. If you could find the fetus and the placenta you could prove it, but you could not do this until the pregnancy had been destroyed, and she had lost her fetus and placenta, (R. 70, 71, 72).

It is submitted that on the question of pregnancy, which the trial Judge stated was at the threshold of the case, there was no showing of pregnancy. The woman's testimony that she had had intercourse on a number of occasions and had passed her period once or twice is certainly no proof; the latter might have been the result of worry as to whether she was in fact pregnant. No fetus or placental tissue was ever found. Blood clots, either of the incredible size stated by the woman or of ordinary character, would not prove it. The uncontradicted expert testimony that bleeding from the mouth of the womb did not show it, and that in point of actual fact pregnancy could not be determined prior to the fourth or fifth month unless by the mouse test, which was never made, seems conclusive that there is no proof of pregnancy in the case. In fact the only argument that can be made in favor of pregnancy in the present case is an argument which assumes as true what the whole case is about, and what the jury was there to determine, i.e., whether the woman was pregnant and whether she had had an abortion. This argument, which runs in a circle, is that the woman would never have come to the doctor for an abortion unless she had been pregnant, thus assuming both the abortion and the pregnancy. The only further argument that can be made must be based upon the testimony of Dr. Mandy to the effect that from his examination of the woman and what she told him, an abortion had been committed. As an abortion presupposes pregnancy the argument would again be that as

she had an abortion she must have been pregnant, and this again runs in a circle and presupposes the fact of an abortion to prove pregnancy, and the fact of pregnancy to prove an abortion. The argument can be put down as amounting to nothing.

The utterly inadmissible and highly damaging testimony of Dr. Mandy will next be discussed.

III

DR. MANDY'S OPINION AS TO WHETHER THE ULTIMATE MATTER TO BE DECIDED BY THE JURY, I.E., WHETHER AN ABORTION HAD BEEN COMMITTED, BASED PARTLY UPON HIS PHYSICAL EXAMINATION OF THE WOMAN AND PARTLY ON WHAT SHE TOLD HIM, WAS ENTIRELY INADMISSIBLE AND HIGHLY PREJUDICIAL.

Dr. Mandy testified that he was an Assistant Resident Physician, specializing in Obstetrics and Gynecology attached to Gallinger Hospital, when the woman, Mrs. Charlot, was admitted. The Court is respectfully requested to read the present Record, (R. 35, 36, 37), to appreciate the nature of this witness' testimony, and the character of appellant's counsels' objection to it. Appellant's counsel objected to it initially on the ground that the Government was trying to get the opinion of the doctor as a result not only of his physical examination of the woman but also as the result of certain questions he asked the woman which she answered. The appellant not being present appellant's counsel contended that these questions and answers were inadmissible under any theory of law. Government counsel, however, contended, very adroitly,

that if the woman's statements tended to corroborate his physical findings his conclusion as to what had happened would be admissible. The witness then stated that he could reach an opinion from her physical findings alone "but used the history as corroborative evidence". He admitted that he had used her history, (R. 37, 39). Thereupon over the objection and exception of counsel for the appellant he testified that he found her acutely ill, bleeding from the vagina and suffering from an infection in the genital organs, with nothing else to indicate the cause of her temperature and her general acute illness, (R. 37). He treated her for some weeks, and in the course of that treatment and from his examination he found that her womb was enlarged and the mouth of it open, which is not usually the case normally. According to the witness this indicated that something had been in the womb and had come out. He could not tell from the nature of the discharge what that was. He then testified as follows:

"As to whether he could tell from her physical condition what had been the cause of that discharge, he could presume but he could not positively state. In his best judgment the discharge was chiefly clotted blood and also contained products of infection, pus and fluid that is associated with infections in that tract. The infection was located in the uterus, i. e., the womb. The following colloquy then occurred: (R. 38)

"Q: Doctor, did you come to any conclusion as to the condition that had existed and existed, and the cause of it?

"Mr. Leahy: I object to that because the Doctor said he could only presume.

"Mr. Goldstein: You are the one that presumes, not him.

"Mr. Leahy: Oh, he said that frankly.

"The Court: You can ask if he came to any conclusion. Did you?"

"The Witness: Yes, I did.

"The Court: Did you form any opinion?"

"The Witness: Why, I concluded what my examination would reveal and what I would determine from the examination alone, regardless of history.

"The Court: What was that?"

"The Witness: Well, it was my conclusion that the patient had had an abortion, having seen a certain number of those cases, they all are alike, and just from the physical findings which I found on the patient I categorized her in the same class with many others I had seen just like that."
(R. 38).

Later the witness testified:

"Q: As a result of what you found there did you come to any conclusion as to whether the condition which existed was a spontaneous or an induced abortion?"

"Mr. Leahy: Now, I object to that.

"The Court: That is, from your examination, can you tell?"

"The Witness: I am sure it was partly. I arrived at the conclusion partly with the history on that."

It is clear from the above that what the witness started out to testify to was merely what he "presumed". He said so frankly: "as to whether he could tell from her physical condition what had been the cause of that discharge, he could *presume* but he could not positively state". He then said that it was his opinion on the basis of other cases that he had seen and from the physical findings with reference to this

particular woman that she had had an abortion. Later, asked by counsel for appellant as to whether he could arrive at this conclusion from the examination alone, he stated he arrived at this conclusion on the basis *partly of what she had told him*. (R. 39). The Witness stated definitely at the beginning of his examination:

“Q: But the opinion which you formed with respect to that examination was formed not only upon your examination of the woman, but upon also what she told you, wasn't it?

“A: Yes, sir.” (R. 36).

It was only later that the witness stated that he could arrive at his opinion from the physical examination alone, “but used the history as corroborative evidence”. (R. 37).

It hardly needs any citation of authority that the witness could not repeat in Court what the woman told him in the absence of the appellant. It would seem equally to follow that the use of what the woman told him to corroborate what he *presumed* had happened was equally inadmissible. The use of hearsay to support an out and out *presumption* is a novel idea: it is simply utilizing hearsay in a different way and by a device getting it before the jury. The same argument applies to permitting the doctor to give his conclusion as to what had happened partly on what the woman told him. His conclusion could not be his professional opinion as to whether an abortion had occurred, based on a medical examination, but was an opinion, partly made up as a result of a physical examination, (and we do not know what part of it or how much of it came from the physical examination,) and partly made up from his taking as true the woman's extrajudicial statements. It is clear, therefore, that his

opinion or conclusion or presumption was based on taking for granted as true, from the lips of the woman, the fact of pregnancy and the fact of an abortion, which facts were precisely the facts the jury was there to find, if they could be found. We feel, therefore, that the doctor's testimony, call it opinion, presumption or conclusion, partly from the physical examination, partly from the statements of the woman Charlot, was vitiated at the source. The testimony was worthless and highly prejudicial.

The authorities are uniform that statements made by the woman either before or after the alleged abortion to her physician are inadmissible, since such statements are merely hearsay and not part of the *res gestae*. This precise question is considered in *Commonwealth v. Sinclair*, 195 Mass., 100, 108, wherein the defendant was charged with abortion, and the prosecution attempted, just as in the present case, to get in evidence the woman's statements to the doctor as part of the doctor's opinion. The Court said:

"The prosecution was allowed, against the defendant's exception, to introduce evidence of the statements made by Annie M. Russell to the physicians who were attending her that she had been operated upon to get rid of her pregnancy, and that this had been followed by a miscarriage. These were not dying declarations, and were not admitted as such. They were testified to by the physicians *in connection with their opinion* as to what she was suffering from when they visited her after the alleged operation, and as a part of the reasons of their opinions, together with the statements which she made to them as her symptoms, sensations and sufferings. It is the general rule that a party cannot prove incompetent facts under the guise of fortifying the opinions of his witness. *Peirson v. Boston Elevated Ry.*, 191

Mass. 223, 233, 234; *Com. v. Tucker*, 189 Mass. 457, 479; *Com. v. Leach*, 156 Mass. 99, 101; *Hunt v. Boston*, 152 Mass. 168." (*Com. v. Sinclair*, 195 Mass., 108. Italics ours.).

Roosa v. Boston, 132 Mass., 439, 440, 441, cited by the Court in the above case gives the reason for the rule.

To the same effect, considering this precise question, is *People v. Murphy*, 101 N. Y., 126, 130, wherein the Court after ruling out statements of the woman to the physician who attended her after the abortion, held that the physician's opinion as a medical expert that an abortion had been produced, "founding that opinion not only upon what he observed of the physical condition of the woman, but upon her statements, and upon the history of the case as derived from her", was inadmissible and reversible error.

In *People v. Kreutzer*, 354 Ill., 430, 437, the Court came to a similar conclusion as in the Massachusetts case above cited. The Court held that it was improper to ask an expert witness, a doctor, to give his opinion as to whether or not an abortion had actually been performed, because that question was the ultimate one which the jury would be called upon to decide, citing *People v. Rongetti*, 338 Ill., 56, 63; *Peo. v. Hagenow*, 334 Ill. 341, 343; *People v. Huff*, 339 Ill., 328, 333. In the latter case the Court reversed the conviction of abortion stating that the question put to the doctor "called upon the witness to determine the whole issue, which was for the jury to decide".

To the same effect, that a woman's statements to a doctor outside of the presence of the defendant are inadmissible, is *Weightnovel v. State*, 46 Fla. 1, 10, 11; *People v. Aiken*, 66 Mich., 460, 475; *State v. Wood*, 53 N. H., 485, 488, 494. See also *Peo. v. Hagenow*, 334 Ill.

341, 342, wherein the woman's statements were made to the police.

In *State v. Clements*, 15 Oreg., 237, 14 Pac., 410, the Court held that statements of the woman to the effect that an abortion had been committed, made by her to a physician who attended her later on, were pure hearsay, inadmissible, and constituted reversible error.

Conversely, statements in favor of the defendant made by the woman to a physician later on are likewise inadmissible.

Howard v. People, 185 Ill., 552;

Bly v. State, 99 Minn., 74;

Maine v. People, 16 Sup. Ct. Rpts., N. Y., 113.

We feel that there is such an unanimity of good sense in the above decisions that further discussion of the matter is unnecessary. Dr. Mandy was either testifying as an ordinary witness or as an expert. As an ordinary witness he could tell what he observed and no more. As an expert he could give his opinion as to what had happened on the basis of what he had observed and his professional experience. In this event appellant's counsel could cross-examine him on whether what he observed was a reasonable basis for his opinion and likewise examine him on his past experience with reference to the observation of these particular facts in other cases. But if the doctor's opinion as an expert was not based solely on his physical examination but was arrived at partly on what the patient told him had happened theretofore, how is it possible to cross-examine the doctor on the basis of what someone else told him? This, of course, is simply the hearsay rule in a nutshell: hearsay statements destroy the right of cross-examination and for this reason are inadmissible. The ingenious statement that

what the woman told him was used by him to corroborate his own opinion does not help the learned doctor. If he was testifying as an expert it is only his opinion which is admissible, not his opinion fortified by someone else's hearsay statements. In this event what he testified to would not be his opinion at all but a mixture of opinion and hearsay and this is precisely the fact here. But in any event it would be a novel principle of law to get in hearsay because it corroborated, in part, a part opinion of a doctor. The theory of admissibility on this point has already been disposed of in the Massachusetts and New York cases already cited.

Finally, permitting the doctor to testify that in his opinion an *abortion* had been performed was held absolute reversible error in *People v. Kreutzer*, 354 Ill., 430, 437; *People v. Rongetti*, 338 Ill., 56, 63; *People v. Huff*, 339 Ill., 328, 333, calling as it did for the doctor's decision on the ultimate question which the jury alone could decide, i. e., whether in fact an abortion had occurred. It must always be remembered that there was no claim by the appellant in the present case that he did not operate on the woman. If, therefore, an abortion had occurred the jury was compelled to come to the conclusion that the appellant had caused it. Permitting the doctor to testify that an abortion had, in fact, occurred, was equivalent to permitting him to decide the entire case for the jury. Nothing more prejudicial or irregular can be imagined.

It is, of course, elementary that pregnancy must be proved beyond a reasonable doubt. In *State v. Stewart*, 52 Iowa 284, the Court specifically held this and reversed a conviction wherein the Court even though it had instructed the jury that they must acquit if upon the whole case they had a reasonable doubt, later instructed the jury on the question of pregnancy that

it was sufficient if they were convinced that pregnancy "had been fully and clearly proven". This was held not equivalent to saying that it must be established beyond a reasonable doubt. To the same effect, as to necessity of proof of pregnancy beyond a reasonable doubt, is:

State v. Rogers, 116 S. W. 469;

State v. Alcorn, 7 Idaho 599;

State v. Stafford, 145 Iowa 285.

In *State v. Stafford*, 145 Iowa 285, the Court stated the rule to be that pregnancy must be proved beyond a reasonable doubt, though absolute certainty was not necessary.

The only testimony left in the case to prove pregnancy beyond a reasonable doubt, after Dr. Mandy's inadmissible testimony is eliminated, as it should be, is the testimony of the woman. While it is conceded that in the present case the woman is not technically an accomplice and so her testimony does not come within the rule with reference to corroboration of accomplices, still being morally *in pari delicto* it is difficult to perceive how the woman's statements alone can prove pregnancy beyond a reasonable doubt. The fact is, of course, that common sense tells us that a woman has no real means of knowing that she is pregnant at the end of a month or two months after cessation of the menses. This was the testimony of the appellant's expert witnesses, two outstanding specialists in the field of obstetrics and gynecology. To say that upon the testimony alone of the woman there is proof of pregnancy beyond a reasonable doubt, taking into consideration the testimony of the appellant's expert witnesses, to say nothing of the appellant himself, seems almost a travesty. There was no proof of pregnancy in the present case beyond a reasonable doubt; the

testimony really was a surmise on the part of the woman, and that is all it was.

The following cases hold that the moral implication of the woman is a proper matter for consideration by the Courts on the question of proof of pregnancy and corroboration:

Seifert v. State, 160 Ind. 464, 474;
Com. v. Boynton, 116 Mass. 343;
Com. v. Wood, 11 Gray 85;
Dunn v. People, 29 N. Y. 523;
Frazer v. People, 54 Barb. 306;
Smartt v. State, 112 Tenn. 539;
Willingham v. State, 33 Tex. Cr. 98;
Wandell v. State, (Cr. A.) 25 S. W. 27;
Watson v. State, 9 Tex. A. 237.

IV

THE COURT'S REFUSAL TO INSTRUCT THE JURY AT ALL ON THE QUESTION OF NECESSITY WAS CLEAR ERROR.

Whatever the statute herein means, whether it means that, as we contend, the *miscarriage* must not be necessary to preserve the life of the woman, or as the Government contends, the use of the instrument or other means must not be necessary, it seems perfectly clear that the question of "necessity" is a vital part of the case. Incredible as it may seem, the trial Court refused to charge on it. In appellant's Prayer No. 3 the Court was asked to charge as follows:

"The jury is instructed that ordinarily in criminal cases it cannot convict a defendant upon the uncorroborated testimony of an accomplice, a person who induces or joins with the defendant to commit the crime. However, in the present case

the woman is not an accomplice. Still, her testimony must be received and weighed with great caution, bearing in mind that if any crime was committed the woman is morally as guilty as the man. The jury is instructed that it must find every element of the alleged offense beyond a reasonable doubt. These elements are:

“(a) That she was pregnant;

“(b) That the doctor used an instrument or means;

“(c) With intent to procure the miscarriage of the woman;

“(d) That such miscarriage was not necessary to preserve the woman’s life or health.

“Unless the above are proved beyond a reasonable doubt the jury must acquit the defendant.

Denied.

Exception.” (R. 73.)

It will be noted that in Subdivision (d) appellant embodies his theory of the case to the effect that the *miscarriage* must be proved not necessary. However, *faute de mieux*, appellant submitted another Prayer as follows:

“The jury is instructed that unless it finds that the alleged operation was not necessary to preserve the life or health of the woman it must acquit the defendant.

Denied.

Exception.” (R. 73.)

A third Prayer was likewise submitted on this question:

“The jury is instructed that it must find beyond a reasonable doubt that the woman’s prior health

was good, otherwise it must find that the operation was necessary to preserve the woman's health and acquit the defendant.

Denied.

Exception." (R. 73.)

The only mention of necessity in the Judge's charge is contained in his reading of Section 809 of the D. C. Code to the jury at the very beginning of his charge, followed by his statement:

"In other words, the law makes it an offense for anyone to procure the miscarriage of a woman either by the use of an instrument or by the use of medicine or drugs or any substance, or by any means, unless it is necessary to preserve her life or health."

It seems evident that the above charge was entirely inadequate even on the Government's theory of the case. It does not explain to the jury that lack of necessity of procuring the miscarriage, or even of the use of the instrument or means is one of the elements of the offense. Nor does it explain to the jury that this element of the offense must be proved beyond a reasonable doubt. In fact when the Court came to explain the elements of the offense it left the question of necessity out entirely. The Court said:

"Now, the first thing that you must determine in this case is whether or not the complaining witness, the Charlot woman, was pregnant with child, and the next is whether or not the defendant Crichton procured a miscarriage either by an instrument or by giving of drugs or medicine, or by any other means whatsoever. If you find that this Charlot woman was not pregnant with child, then you need go no further. Your verdict should be not guilty.

"However, if you find beyond a reasonable doubt that she was pregnant with child then you

would consider whether or not the defendant performed or brought about an abortion, and finding those two elements beyond a reasonable doubt, then you consider whether that was pursuant to the charge in the first count, or the second count, an instrument, the exact nature of which is known, or by the third count, by some means which is unknown. You may find him guilty on any one of them and not guilty of the other two." (R. 75, 76.)

The Court's charge then goes on into a general discussion of presumption of innocence, reasonable doubt, etc. At the very end of his charge the Court said:

"If you believe beyond a reasonable doubt that this woman was pregnant with child and that a miscarriage was brought about and procured by the defendant it would be your duty to return a verdict of guilty on the Count that charges the means you find used." (R. 78).

It will be noted that this omits to mention at all that the burden of proving beyond a reasonable doubt that the miscarriage was not necessary to preserve the life or health of the woman was upon the prosecution. In fact it conveys the impression that the offense had only two elements: (1) Pregnancy; and (2) That a miscarriage (?) was procured by the appellant.

It seems clear that the Court's charge on the question of necessity was grossly inadequate and misleading, whether necessity refers to the miscarriage or the use of the instrument or means if one or the other were necessary to preserve the life of the woman there was simply no offense. Assuming the Court had the strongest conviction that appellant's counsel were wrong relative to the necessity to prove that the *miscarriage* was not necessary, still, even then the Court would be compelled to adopt the alternative Government theory that something was not necessary, i. e., the

use of instrument or means. It is a complete mystery to counsel why the Court refused to charge on it.

If appellant's construction of the statute is correct, and it is an essential element of the offense that the *miscarriage* was not necessary to preserve the life of the woman it necessarily follows that a failure to instruct relative to it is reversible error. As to this see:

State v. De Groat, 259 Mo. 364;
State v. Longstreth, 19 N. D. 268, 272;
State v. Wells, 35 Utah 400, 409;
Moody v. State, 17 Ohio 110;
State v. Bassett, 26 N. M. 476.

Even if appellant were wrong and the Government were right an instruction would be necessary to the effect that the use of the *instrument* or *means* was not necessary to save the life of the woman. Giving no instruction at all on the matter practically eliminated the question of necessity from the case.

It should likewise be noted that the failure of the Judge to grant appellant's instruction No. 3 relative to the burden of proof on the question of the lack of necessity left the jury in the dark as to whether the burden of proof was on the Government to prove lack of necessity, or whether it was a matter of defense necessary to be established by the appellant. As already seen in the present Brief the overwhelming weight of authority is that the burden of proof relative to lack of necessity is upon the Government, not upon the appellant. See:

Connecticut: *State v. Lee*, 69 Conn. 186;
 Delaware: *State v. Brown*, 3 Boyce, 499;
 State v. Magnell, 19 Del. 307;
 Iowa: *State v. Dunklebarger*, 206 Iowa 97;
 State v. Shoemaker, 138 N. W. 381;
 State v. Aiken, 109 Iowa 643;

Missouri: *State v. Johnson*, 246 S. W. 894;
State v. DeGroat, 259 Mo. 364;
State v. Sonner, 253 Mo. 440;
State v. Meek, 70 Mo. 355;
State v. Schureman, 70 Mo., App. 518;
Nebraska: *Dixon v. State*, 46 Neb. 298;
North Dakota: *State v. Longstreth*, 19 N. D. 268;
Ohio: *Bridge v. State*, 20 Ohio, Circuit Court, New Series, 231;
Oregon: *State v. Clements*, 15 Oreg. 237;
State v. Glass, 5 Oreg. 73;
Utah: *State v. Wells*, 35 Utah 400;
Vermont: *State v. Montifoire*, 95 Ver. 508;
Washington: *State v. Powers*, 155 Wash. 63.

State v. Clements, 15 Oreg. 237, cited above, gives succinctly the good sense of the rule, criticizing the New York theory given in *Bradford v. People*, 20 Hun 309, and pointing out that the matter of convenience as to who can prove lack of necessity easier, the State or the defendant, should not outweigh the fact that the burden of proof in a criminal case is on the Government, particularly as to part of the corpus delicti. If, therefore, a statute makes it criminal to procure a miscarriage only in the event that the miscarriage was not necessary to preserve the life of the woman, which is the District statute, it seems beyond question that the burden of proof is on the Government. Whether the Government sustained this burden will now be discussed.

There Was No Proof That Either the Miscarriage or the Use of "Certain Means" Was Not Necessary to Preserve the Life of the Woman.

Even if the Court had properly instructed the jury on the question of necessity to preserve the life of the woman and the burden of proof in regard thereto, the fact is the present Record shows absolutely no proof

on this point. Proof of lack of necessity usually takes the form of showing that the woman was in perfectly good health prior to the alleged abortion, from which it may be inferred that the miscarriage or operation was accomplished solely to produce a criminal abortion. The rule on this is as follows:

“Circumstantial evidence may be sufficient to prove the absence of necessity for an operation in order to preserve the woman’s life. Evidence of antecedent good health prior to the use of the means by which the abortion was committed is a sufficient compliance, nothing in contravention appearing, with the burden of proving that the operation was not necessary to save the life of the woman. A failure to show such a state of health, or a showing that the woman was in fact unwell before the use of the means constitutes a failure to show facts or circumstances from which the jury could find that the use of the means was not necessary to save the life of the woman.” (1 Corpus Juris, Secundum, Sec. 32, p. 338).

Applying this rule to the present case, not even the woman testified that she was in good health prior to the operation. Her testimony is limited to the statement that she was not bleeding in the vagina. (R. 18-20) As against this, she admitted that subsequent to her husband’s death she got into an upset condition and started drinking to excess and took dope at one time. Her testimony that she was not bleeding in the vagina when she first saw the appellant is offset by her testimony on cross-examination that the very first time she saw the appellant she was suffering from nausea. (R. 25) She admitted that the appellant asked her whether some one else had been interfering with her (R. 26), which is a strong indication that the appellant’s physical examination of her vagina plus her suffering from

nausea indicated that something was wrong in her vagina, hence the question whether some one had been interfering with her. She admitted that she weighed only 96 or 97 pounds at that time. (R. 26).

As against the statement of the woman that she was not bleeding from the vagina (R. 18-20), which must be considered with her later testimony on cross-examination above referred to, and which as already noted does not establish her good health, we have the testimony of the appellant that the very first time he saw her her appearance was pale, anemic, she was highly neurotic and underweight, agitated, puffy and with dark circles under her eyes. He said she complained of nausea and had "wave" cramps in her abdomen. (R. 42) His physical examination showed an undernourished, anemic and neurotic woman suffering from a discharge of whites in the vaginal canal with blood issuing from the mouth of the uterus, (leucorrhea), (R. 41-43). The appellant's records show the notation "bleeding" on his examination May 22nd, (Defendant's Exhibit 2, R. 49). On another record appears the notation "complains of—slight nausea and cramps, uterus". "Pat. highly neurotic, anemic, agitated mind, constant cigarette smoking." "dissipated appearance". (R. 49). A later notation shows: "Examination: slight amt. of whites and some blood on gloved hand * * * admits physical contact, but denies any interference by any means." (R. 50). Subsequent clinical records are to the same effect.

It is submitted that on the basis of the above showing on both sides there was no real proof in the case that the abortion or the use of the "means" was not necessary, still less proof beyond a reasonable doubt. The whole case in fact hangs upon the uncorroborated statement of the woman that she was not bleeding from the vagina when she visited the appellant. The neces-

sity of corroboration of the woman's testimony has already been adverted to and cases have been cited to this effect in the present Brief. (P. 91) They are especially applicable here, particularly when the amount of proof relative to lack of necessity of the miscarriage in the present case is compared with other reported cases, such as:

People v. Hagenow, 334 Ill., 341;
State v. Dunkelbarger, 206 Iowa, 971;
State v. Sonner, 253 Mo., 443, 446;
State v. De Groat, 259 Mo., 364.

There being no proof of the lack of any necessity at all, whether for the miscarriage or the use of the instrument or means, the present case should be reversed on this point alone.

V

THE EVIDENCE IS PALPABLY INSUFFICIENT TO SUSTAIN THE VERDICT AND THE MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

It has already been shown in the present Brief that there was no proof of pregnancy, (Present Brief, p. 77-82.) It has likewise been shown that there was no proof by the Government that either the miscarriage or the use of the means was not necessary to preserve the life of the woman. The Court should, therefore, have granted appellant's motion for a directed verdict.

As to proof of pregnancy it has already been shown that, after eliminating the inadmissible testimony of Dr. Mandy, part hearsay and part surmise, neither factual nor expert in character, the only testimony left

to prove pregnancy is the testimony of the woman, who could not possibly know, when she had passed one or two periods, according to appellant's two expert witnesses, whether she was pregnant or not. This is the state of the Record generally: it will be found, on examination, that practically the entire case for the Government rests upon the testimony of one disreputable woman, morally if not legally an accomplice, if her story were true, whose testimony has not the slightest corroboration. The Court, therefore, for purely legal reasons, should have granted appellant's motion for a directed verdict.

But, aside from so-called legal grounds, the Record shows how improbable it is that the appellant committed the present offense. The records he kept, (R. 49-54), should alone show his entire good faith. If the Government charges, without any proof of course, but simply as a stab in the dark, that these records were made up afterward, we say they show on their face that they could not have been made up afterward. The woman first went to the appellant on May 22; appellant's last treatment was May 27. The appellant on May 28 could not have forged or fabricated the set of clinical records containing details of the woman's health from day to day unless he had kept a record at the time. If he kept a record, *any* record, not necessarily these particular records, it rebuts the argument that he was performing an abortion upon her because doctors performing abortions don't keep records. We ask the Court to note on the records details such as, on May 22: "Temperature, 99.3, pulse 100"; on May 23, "Temperature, 99, pulse 88"; on May 24 "Temperature, 9 A. M., 98, 5 P. M., 99, pulse, 9 A. M., 96, 5 P. M., 100". (R. 50, 51-54). The variations in temperature on the following days, May 24, 25, later May 25, May 26, later May 26 and May 27, (R. 51-54),

could not possibly have been remembered; they must have been recorded at the time. The other statements on the records (R. 49-55) are equally particularized and equally impossible to have been fabricated afterward. The very form of the records, the abbreviations, misspelling, etc., show that they were ordinary doctor's memoranda of data, hastily put down at the time and not reconstructed later for purposes of exoneration. The records alone should have convinced the Court and jury of the appellant's good faith.

The appellant's testimony also shows clearly that he was innocent. Granting that his credibility was a question for the jury his testimony was consistently believable from the start. Even if the jury wanted to disbelieve him capriciously and arbitrarily they could not do so for some of it was corroborated by the woman herself. As an instance, there is the woman's highly significant statement that the appellant asked her whether she had interfered with herself, to which she replied she did not recall such a question from the appellant. She did, however, say that he asked her whether anybody else had been interfering with her, (R. 26). This is corroborated by the doctor's record of her first visit wherein it is noted that she "denies any interference by any means", (R. 50). Why would the appellant have asked her any such question unless there were some physical symptoms that something was wrong in the region of the woman's vagina? And if there was something wrong would not the appellant, a licensed physician and an expert in women's diseases, have the right to do precisely what he did, examine her? Even if he thought the woman was pregnant (he could not be sure of it according to the other two doctors who testified) and even if the appellant had deliberately attempted to make her miscarry he would, under the rule relative to necessity to preserve

the health of the woman, have had the right to produce such a miscarriage. The testimony, therefore, of the Government's own witness proves that he had a right to do even what the Government thinks he did, to say nothing of what the appellant testified he did.

Further, if the doctor had performed a criminal abortion upon her would he have asked her to save the "blood clots"? (R. 20). And yet the woman testified that this was precisely what he asked her to do and this shows on his records, (R. 50, 51). Could there possibly be a better way of achieving his own conviction than asking his patient to save the one thing which would prove both pregnancy and the abortion at one and the same time, i. e., the fetus and the placenta? It must be remembered that the theory of the present case is not that the fetus was taken out by the doctor in his office, but that he merely punctured the woman's womb, with the plan of having her pass the fetus later on in the Hotel. The woman's testimony that he told her to take a walk shows this, (R. 18). It seems incredible that he would have asked her to save the blood clots if he had attempted to cause an abortion or, more important, if he thought she was pregnant. This evidence likewise supports appellant's testimony that he did not think she was pregnant but was suffering from leucorrhea when he first saw her.

Next, if he had aborted the woman, would he have continued to attend her? His records show, and she testified that he visited and treated her eleven times after the original operation, visiting her in broad daylight and at night in a hotel room, making no effort to conceal his identity at any time. Would he have given her pituitrin to stop the bleeding, not to promote it?

We submit that the above constitutes such strong indications of the innocence of the appellant and his

entire good faith throughout that, considered with the woman's testimony, alone and uncorroborated, it was clear error of the Court not to take the case from the jury. Even if the testimony of Dr. Mandy were admissible, even then there was hardly enough evidence to submit the case to the jury, and Dr. Mandy's testimony does not really corroborate the woman, it simply proves that what she said in Court she said outside of Court. This is not corroboration. It leaves untouched the question of her veracity and likewise untouched the rightness or wrongness of her opinion as to what had happened. Above all, looming up behind everything else is the entire lack of proof of her pregnancy and similar lack of proof that the operation was not necessary for the woman's health.

The evidence is clearly insufficient to sustain the verdict and from every angle the motion for a directed verdict should have been granted.

VI

THERE WAS A FATAL VARIANCE BY THE VERDICT ON THE THIRD COUNT ALLEGING THE USE OF "MEANS UNKNOWN" TO COMMIT THE OFFENSE.

There is a fatal variance between the allegations of Count 3 to the effect that the alleged miscarriage was accomplished by means unknown and what the proof actually showed. As already stated the appellant was acquitted on Counts 1 and 2 alleging respectively the use of a catheter in Count 1 and the use of "certain means and instruments, the exact nature of which are to the Grand Jurors aforesaid unknown" and Count 2, (R. 5). He was however convicted on Count 3 alleging that he used "certain means the exact nature of which" was unknown.

It is well known that the averment that an essential element of the offense is unknown to the Grand Jury must be proved as laid, (31 C. J., 853).

The evidence in the present case does not show the slightest conflict relative to the exact means by which the alleged abortion was accomplished. The following was the woman's testimony:

"She said that she got on the operating table, put her feet in the stirrups and her knees were raised as she did this. Dr. Crichton was washing his hands, and the next thing Mrs. Charlot said she remembered was a long metal instrument in the doctor's hands. The doctor was approaching the table with the instrument which Mrs. Charlot said was about 18 inches long, narrow and with a handle on it. This instrument, Mrs. Charlot said, was inserted in her. Dr. Crichton was standing right at the bottom of the table where her feet were, and the instrument was inserted into her vagina, it was then adjusted several times, and then Dr. Crichton moved it with a circular motion two or three times while it was in Mrs. Charlot. Mrs. Charlot further said that she felt some irritation while the instrument was in her, which was only a few minutes. She then said that she thought he had dilated the vagina but that she did not see anything that would have caused the dilation. Mrs. Charlot said that before she went to Dr. Crichton's office the morning of the 22nd she was not having any hemorrhage from the vagina, that she was not bleeding when she got on the operating table. After the withdrawal of the instrument the witness laid down on the couch in his office, at which time she had quite a bit of pain." (R. p. 19, 20).

On cross-examination she stated:

"Getting back to May 22nd she had testified that after she took her position on the operating table she saw the doctor with a long metal instru-

ment in his hands. She did not know what a catheter is. She did not know of ever having seen one. She had made an affidavit in the present case at the Police Court. As to whether she had sworn in that affidavit that the doctor had used a catheter on her, as nearly as she could remember they described instruments and asked her if it was that and she had said that it might have been. In answer to the direct question 'Didn't you swear that it was a catheter?', she said 'I don't believe that I swore that it was' * * *.

"Going back the witness had testified that she saw in the hand of the doctor a long metal instrument. This was true. It was true that he had inserted it in her and made some adjustments. * * *

"The couch she testified she laid down on on the 22nd after appellant had inserted the instrument was in his office across the room from his desk, not in the operating room or the waiting room. She was not sure whether the doctor had inserted anything else in her besides this instrument. She remembered having her vagina dilated but could not see what happened." (R. p. 26, 27, 28).

The affidavit of complaint filed in the Police Court, above referred to, stated that with intent to procure a miscarriage the appellant inserted into the woman's vagina a catheter, it not being necessary to insert the said catheter into her vagina. (R. 28).

The above is all the testimony in the Record as to the actual way the alleged miscarriage was accomplished. This being the case, it is clear that if a miscarriage, in its legal sense, was procured, it was procured by the use of an instrument or instruments upon which the jury, everything else being conceded, might conceivably have found the appellant guilty of Count 2 alleging the use of "certain means and instruments", but never could have convicted him under Count 3 alleging the use of "certain means the exact nature of which" was unknown. Counsel for appellant do not

believe in being too technical about these matters, but we submit that the finding of guilty on Count 3 charging that the appellant used "means unknown", when the proof clearly showed the use of an instrument or instruments is not only a fatal variance but an indication of the confusion of thought of the jury which will be adverted to further on in the present Brief. As we have said, we do not believe in being too technical. However, this Court must determine for itself whether the appellant got a fair trial. There is a tendency, we realize, in the Courts today to treat variances lightly. Under Section 1025 R. S., (18 USCA, Sec. 556) this Court is required to disregard any matter of form in the trial of a criminal case. So also Section 269 of the Judicial Code (28 USCA, Sec. 391) requires this Court on appeal to "give judgment after an examination of the entire record before the Court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties." The latest authoritative application of this rule is in *Berger v. U. S.*, 295 U. S., 78. In that case the Supreme Court held that the variance therein showing two conspiracies where one was charged was not material, citing the above statutes. But even there the Court was careful to state that it did not mean to say that a variance such as that there dealt with might not be material in a different case, stating the test was whether on the whole record the defendant got a fair trial. The Court went on to reverse the case as the result of the gross misconduct of the prosecuting attorney.

As to whether, under the above case, the present variance is material we can only say that a variance which is complete, i. e., a verdict absolutely contrary to the direct evidence in the case, ought to be regarded as material. While it may be true that Courts are re-

luctant, after a trial, to reverse unless the alleged error substantially prejudiced the defendant, still this doctrine can be carried only so far, otherwise a criminal case becomes a mere collaboration between an Appellate Court and a misguided jury. A verdict wherein one of the essential elements of the crime has literally no evidence to support it seems to us to carry the doctrine of harmless error to the extreme and make the trial not "according to the forms and processes of law" but hardly a trial at all, as lawyers know it.

VII

HAVING BEEN ACQUITTED ON COUNTS 1 AND 2 THE VERDICT ON COUNT 3 IS REPUGNANT

The defendant was acquitted under the first two counts. (R. 7) The second was in the identical language of the third except that it was all-inclusive.

Count 2 charged:

"That one Theodora I. Charlot, on, to wit, the twenty-second day of May, 1936, was pregnant with child, and that on, to wit, the said twenty-second day of May, 1936, and at the District of Columbia aforesaid, one Macpherson Crichton, well knowing the premises aforesaid, unlawfully, feloniously, knowingly, wilfully and with intent to procure the miscarriage of the said Theodora I. Charlot, in and upon the said Theodora I. Charlot, then and there being, did use certain means and instru-

Count 3 charged:

"That one Theodora I. Charlot, on, to wit, the twenty-second day of May, 1936, was pregnant with child, and that on, to wit, the said twenty-second day of May, 1936, and at the District of Columbia aforesaid, one Macpherson Crichton, well knowing the premises aforesaid, unlawfully, feloniously, knowingly, wilfully and with intent to procure the miscarriage of the said Theodora I. Charlot, in and upon the said Theodora I. Charlot, then and there being, did use certain means, the exact na-

ments, the exact nature of which are to the Grand Jurors aforesaid unknown, the use of said means and instruments as hereinbefore alleged being not then and there necessary to preserve the life or health of the said Theodora I. Charlot, as he, the said Macpherson Crichton, then and there well knew;"

ture of which is to the Grand Jurors aforesaid unknown, the use of said means as hereinbefore alleged being not then and there necessary to preserve the life or health of the said Theodora I. Charlot, as he, the said Macpherson Crichton, then and there well knew;"

It thus appears that the two counts are identical in language saving the broader and more inclusive averments of count two. Count two includes count three. Count three is superfluous and meaningless under the language of count two. Any acquittal under count two ought therefore to result in an acquittal under Count three. There is no explanation in reason, logic or justice under which this accused could be acquitted of the charge that he used *certain means and instruments unknown* and then found guilty of having used *certain means unknown*. There is no basis for the verdict. The jury simply blew hot and cold under an oath which each took to render a true verdict on the evidence and the law. Not that we blame the jury; the trial judge told them bravely they could find him guilty on any one count and acquit on the other two. (R. 75-76) The injustice is further accentuated by the finding that means unknown were used when the complainant testified in detail about the instructions which the doctor gave her, her pursuit thereof and the instrument used together with the method of its employment. The verdict was so clearly contrary to the evidence, repugnant in fact and law that it should never have been permitted to stand. An argument that "the means by

which the miscarriage was procured" is immaterial is no answer. That argument misstates the law. The means employed to produce the miscarriage must be stated in the indictment with as much certainty as the evidence before the grand jury will permit (*Com. v. Noble.*, 165 Mass. 13) and the allegation that an essential element of an offense is unknown to the grand jury is an averment to be proved as laid. See 31 C. J. 851, Sec. 480.

Neither is it a sound argument to advance that as

"each count of an indictment is a separate charge * * * the acquittal upon one or more will not be a bar to a conviction upon another count of the same indictment. The gravament of the offense is the same, while the means by which the offense is accomplished are differently alleged."

The vice in this argument is that in this indictment "the means by which the offense is accomplished" are *not differently* alleged. They are alleged *in eisdem verbis*. *Borum v. United States*; *Dunn v. United States*; *Dealy v. United States*; *Walsh v. United States*; *Tabler v. Ohio*; *Griffin v. State*, are all entirely and easily distinguished from the present inexplicable and positively unique verdict. The present case is not one to be governed by the law of these cases. Had this petitioner been acquitted under count two as a separate indictment, could it be argued successfully he could not plead former jeopardy to another indictment in the words of count three subsequently preferred against him? The law governing this verdict is analogous to that wherein one crime includes another and the prosecution for the higher is a bar to the prosecution for the lower and an acquittal of the higher bars a conviction of the lower. (16 C. J. 271.)

This accused was indicted for the commission of but

one offense. That offense was charged to have been committed in three ways: (1) Count 1, by the use of a catheter;—as to which there was not a scintilla of evidence and which the court below should never have permitted to go to the jury upon any theory of fact or law; (2) in Count 2, the pleader laid his charge to include *every method* by which the defendant could possibly have committed the offense. He was acquitted. (3) Having been acquitted of using any method at all, under what predicate now can it be asserted he can be convicted of having used *some method*, alleged in Count 3 but already included in and destroyed by his acquittal under Count 2.

Bearing in mind that there was a motion to elect in the present case (R. 72), which might have prevented the present error, it seems clear that the verdict and judgment herein cannot be sustained. The motion in arrest of judgment should have been granted.

CONCLUSION

The trial and judgment below contain so many errors in violation of the substantial rights of the accused that the judgment below seems clearly illegal and should be reversed.

Respectfully submitted,

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UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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In the United States Court of Appeals
for the District of Columbia

APRIL TERM, 1937

MACPHERSON CRICHTON, APPELLANT

v.

UNITED STATES OF AMERICA

BRIEF ON BEHALF OF APPELLEE

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**In the United States Court of Appeals
for the District of Columbia**

APRIL TERM, 1937

No. 6908

MACPHERSON CRICHTON, APPELLANT

v.

UNITED STATES OF AMERICA

***APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA***

BRIEF ON BEHALF OF APPELLEE

STATEMENT OF THE CASE

Appellee, deeming the statement in appellant's brief to be incomplete and inadequate, submits the following statement of the case:

The appellant, Macpherson Crichton, has been sentenced to be imprisoned for the period of one year to eighteen months, and his license to practice medicine in the District of Columbia has been revoked under an indictment charging him with a violation of Section 809 of the District of Columbia Code (R. 7, 8).

THE INDICTMENT

The indictment is in three counts. The first count charges that one Theodora I. Charlot on May 22, 1936, was pregnant, and that on the same day at the District of Columbia the appellant well knowing the premises, feloniously and wilfully and with intent to procure the miscarriage of Charlot, in and upon said Charlot, did use a catheter, the use of which being not necessary to preserve the life or health of Charlot as the appellant well knew; against the form of statute, etc. (R. 5).

The second count is identical except that instead of charging the use of a catheter it charges that appellant used certain means and instruments the exact nature of which was to the Grand Jurors unknown (R. 5).

The third count is identical with the first except it charges instead of the use of a catheter the use of certain means the exact nature of which was to the Grand Jurors unknown (R. 5, 6).

THE STATUTE

Section 809, District of Columbia Code, reads as follows:

Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health and under the direction of a competent licensed practi-

tioner of medicine, shall be imprisoned for not more than five years or if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years.

THE PROCEEDINGS

There were no motions or demurrers or other proceedings before the trial. The attack upon the sufficiency of the indictment, requiring fifty printed pages of appellant's brief and hereinafter referred to, was first made after the opening statement of the government at the trial. See *Hagner v. U. S.*, 285 U. S. 427.

THE FACTS

Summarized, the facts are as follows:

According to the evidence offered by the government, Theodora I. Charlot, a widow who had been living in New York City until shortly preceding the date charged in the indictment, had sexual relations with several persons in her apartment in New York in January, February, and March 1936. About the middle of April 1936 she missed her menstrual period which was due at that time, and on April 29, came to Washington. On May 13, 1936, she went to see a Dr. Heller who examined her, and as a result of her conversation with Dr. Heller she went to see the appellant on May 14, at his office in Washington, where she asked him if he would perform an abortion. The appellant agreed to per-

form the abortion for one hundred dollars, whereupon Mrs. Charlot left his office saying she would come back if she could get that much money (R. 16, 17, 18, 24).

On May 21, 1936, having procured one hundred dollars she returned to the appellant's office where she told him she had the money, whereupon the appellant examined her and said he believed she was pregnant, and she paid appellant \$100. The appellant told her to take a douche and a physic that night and a douche the next morning, and to buy some rubber sheeting. He also told her to get a room in a hotel, saying that she could not go to a hospital with a case of that kind. He also told her to return to his office at 9:00 the next morning and not to eat any breakfast, but to take a walk after the operation. She was having no hemorrhage or bleeding on May 14 nor on May 21. She did as the appellant directed, buying the rubber sheeting and taking the douches and physic. She also obtained a room at the Powhatan Hotel. She was not bleeding and did not have any hemorrhage from the vagina on May 22, 1936, and on that day she went to the appellant's office and went into the operating room behind his office where appellant asked her about the douches and physic. She also told the appellant that she was staying at the Powhatan. After taking off her step-ins she got on the operating table, putting her feet in the stirrups and raising her knees. The appellant then approached her

with a metal instrument about eighteen inches long, narrow, with a handle on it, which was inserted in her. The appellant stood at the bottom of the table and inserted the instrument into her vagina. It was adjusted several times and the appellant moved it in a circular motion two or three times. She felt some irritation while the instrument was in her, which was only a few minutes. She thought he had dilated the vagina, but did not see anything which would have caused the dilation. After the withdrawal of the instrument she lay down on the couch in the appellant's office and was feeling quite a bit of pain. She rested on the couch for a while and then went to the Powhatan Hotel where she went to bed. She was having a good deal of pain at the time (R. 18, 19, 20).

Later that afternoon appellant called to find out how she felt. She said she was feeling very bad and had a great deal of pain, and that a hemorrhage had commenced. The appellant said this was rather unusual, but he expected it because she had started having pains so soon. The following day, May 23rd, the appellant called to see her and gave her some sleeping powders. She asked for a hypodermic, but appellant said it would hinder the miscarriage. On May 24, the appellant called to see her and gave her some more sleeping tablets. He also asked her to conserve any blood clots which had started the preceding day around noon and were about six inches around. The hemorrhage started

on Friday, May 22, and continued through the day, Saturday and Sunday, and the bleeding was very profuse. Mr. Fox, a friend of hers with whom she had been staying in Washington before going to the Powhatan Hotel, called to see her on Monday, May 25. The appellant called on her while Mr. Fox was there and she introduced him to the appellant as an old friend who understood what had happened. On this occasion Mrs. Charlot gave the appellant some blood clots which she had saved and the appellant flushed them down the toilet. She did not know whether appellant had examined them or not because the bathroom was separate from her bedroom. The appellant also gave her more sleeping powders and told her to use an ice pack. At two or three o'clock Tuesday morning, May 26, she called the appellant, at which time she was very ill and suffering more pain. He came over in about five minutes, his office being within a block of the hotel, and appellant told her he thought some obstruction was causing the pain and massaged her abdomen. Appellant stayed almost an hour and returned Tuesday afternoon, at which time the housekeeper of the hotel came to the door and said she wanted to know how Mrs. Charlot was getting along, and who the appellant was. He gave her his name. The appellant massaged her abdomen again and the blood clots were continuing. On the following day, May 27, appellant called to see Mrs. Charlot and told her that he had to leave town the

next day ; that he would be unable to attend her any more and that she would have to make other arrangements. At no time did appellant suggest to Mrs. Charlot that she should go to a hospital, but he told her that if she had to go to a hospital not to tell what had happened, as it would get them both in trouble. He also said that if she went to the hospital to say that she had fallen down stairs or something like that. She saw the appellant no more after that (R. 20, 21, 22, 23).

On this Wednesday afternoon of May 27, Dr. Rosser, the hotel physician, came to see Mrs. Charlot and made arrangements for her to go to Gallinger Hospital, where she met Dr. Arthur Jennings Mandy, a physician attached to this hospital. The hemorrhages continued for three weeks ; then Mrs. Charlot went to the Women's Bureau, and in about a week after that they commenced again and she went back to the hospital and remained there for about four days (R. 22). Mrs. Charlot did not know what a catheter was and was not sure whether the appellant had inserted anything else in her besides the instrument which she described. During the examination on May 21, the appellant inserted his fingers in her vagina and pressed on her abdomen (R. 26, 28).

Dr. Marion Thomas Rosser, the physician at the Powhatan Hotel, had a conversation with the appellant on May 27. He stated to appellant that Mrs. Charlot's case had been brought to

his attention due to the fact that there was a lot of bloody linen coming down from her room and he told the appellant that the Manager had requested him to call and get the patient out of the hotel. Appellant replied that he had been trying to get her out for a couple of days, but she would not go, and that she was in pretty good condition and not very ill. Appellant said he would try to get her out of the hotel again, but if he were unsuccessful he would withdraw from the case. Dr. Rosser had a second conversation with the appellant about half an hour later and appellant said he had been to see the patient and thought that she ought to be in the hospital, but that he was going to leave the city the next morning and would not be able to see the case through. Appellant asked Dr. Rosser to see Mrs. Charlot and Dr. Rosser said he would. Whereupon he went to Mrs. Charlot's room, made an examination of her, found that she was "mightly bad off, bleeding profusely, and in need of hospitalization." Subsequently Dr. Rosser called Gallinger Hospital and arranged for her admission (R. 32, 33, 34).

Dr. Arthur Jennings Mandy, a physician attached to Gallinger Hospital, specializing in gynecology and obstetrics, made an examination of Mrs. Charlot on May 27, and testified that he had made a physical examination of Mrs. Charlot on May 27, and that it was his opinion from the physical findings that Mrs. Charlot had had an abortion (R. 35-37).

The appellant testified, after giving a biographical sketch of himself, that he first saw Mrs. Charlot on May 22, 1936, and that she was then pale, anemic, under weight, and highly neurotic; that she complained of nausea and said she had had an abortion some years before; that he made a bimanual examination of her; that he took a speculum and passed it into her vagina and made an examination and applied a pair of dressing forceps and swabbed out the vaginal canal, there being a discharge of whites in the vaginal canal and some blood issuing from the mouth of the uterus; that he treated her and visited her at the Powhatan Hotel on May 22, 23, 24, 25, 26, and 27; that he tried to persuade her to go to the hospital, but that he could not persuade her to do so; that Mr. Harnett of the Powhatan Hotel telephoned him that Mrs. Charlot was disturbing the hotel and her discharges were messing up everything and asked him to get her out, but that Mrs. Charlot would not go to the hospital; that subsequently Dr. Rosser asked the appellant for his consent to see Mrs. Charlot, which appellant granted and thereafter withdrew from the case. The appellant offered his office records in evidence which, among others, show the following facts: The first record dated May 22, 1936, has on it this significant statement, "No instrument passed into uterus." The second record of May 22, 1936, contains the following entry, "Inevitable abortion apparent. Diagnosis,

eight weeks miscarriage.” Appellant did not know whether or not he was entitled to practice in any of the hospitals in the District, but in recent years he had no patients there. He further testified that at the time Mrs. Charlot came to see him that there was nothing particularly alarming about her condition, except her general condition which was far from healthy, and further that Mrs. Charlot came to him for an examination for “potential pregnancy” and he told her that she was possibly pregnant (R. 59, 60).

Dr. John Thomas Kelley and Dr. Williams Sinclair Bowen testified that it was practically impossible to be sure of pregnancy after a woman had passed her period once or perhaps twice, and that you can not be sure of it until you feel the movements and hear the fetal heart. Also there is a laboratory test known as the mouse test, which is about ninety-nine per cent definite when a woman has passed her period but once (R. 68-72, inc.).

ARGUMENT

I

The indictment charges the offense denounced by the statute

The appellant contends that the exception in the statute reading, “unless when necessary to preserve her life or health”, relates to procuring a miscarriage and not to the administering of drugs or the using of instruments or means, and, there-

fore, when the indictment charged that the use of means was not necessary to preserve the life or health of Mrs. Charlot it did not charge an offense within the statute.

This is a novel conception of the meaning of this exception in the statute and entirely contrary to the meaning attributed to it since its enactment. The offense charged by this statute is the prescribing or administering of medicine or the using of an instrument or means with intent to procure the miscarriage of a woman. A physician who prescribes medicine or uses an instrument or means with this intent is relieved of criminal liability when the administering of the drugs or using the means is necessary to preserve the life or health of the woman. The gravamen of the offense is the prescribing or administering of medicine or the using of a means. These acts are made unlawful, unless when necessary to preserve the life or health of the woman. The intent is specific in this case and must be to procure a miscarriage. The appellant's contention is that the clause containing this specific intent, and not the criminal act itself, is modified by the exception. This would result in a most strained and unusual construction when it is considered that the offense is not the procuring of a miscarriage, but the prescribing of medicine or the using of an instrument or means. The statute does not denounce the procuring of the miscarriage, and this may not be accomplished in fact and yet a

person who uses these means, unless necessary to preserve the life or health of the woman, with intent to procure a miscarriage, is liable under the statute. But under the appellant's construction he would have to insert the words "the miscarriage is", after the words "unless when", thereby presupposing the accomplished event of miscarriage, and thus defeat the purpose of the statute to make unlawful an attempt in the manner provided to procure a miscarriage.

Furthermore, unless the words "the miscarriage is" are arbitrarily inserted after the words "unless when", appellant is driven to the position of contending that the verb modified by the conjunction-adverb "unless when" is the verb "to procure" which verb is not antecedent to the conjunction-adverb "unless when." The verbs antecedent to the conjunction-adverb "unless when" are the verbs "prescribes", "administers", and "uses." If the conjunction-adverb "unless when" goes further back in the clause and modifies the verb "to procure" contrary to grammatical principles, a most extraordinary result occurs, for then the statute would make the immunizing clause beginning with "unless when" referable only to the intent, whereas it clearly is referable to the criminal acts denounced. If appellant's contention is that the conjunction-adverb "unless when" modify a noun, he must skip back to the very beginning of the section to the word "miscarriage" and overlook the fact that the nouns antecedent to "unless when"

are "medicine", "drug", "substance", "instrument", and "means."

This court on three occasions has reviewed sentences of conviction under indictments drawn on the same theory as the instant one. The first case was *Maxey v. United States*, 30 App. D. C. 63, decided in 1907, in which the court in the opinion stated that the second count of the indictment charged substantially that the defendants made an assault upon one Parrish, who was then and there pregnant with a child; that in making the assault they used an instrument called a catheter which they thrust into the womb of Parrish with intent thereby to cause a miscarriage; that they were not licensed practitioners of medicine, *and that the use of the said instrument in said way was not necessary to the preservation of the life or health of the said Parrish.*

The second case is *Thompson v. United States*, 30 App. D. C. 352, decided in 1908, and the court in its opinion stated that one Thompson was charged by an indictment in three counts with inserting an instrument of description unknown to the Grand Jurors into the womb of a certain pregnant woman with intent to cause her to give premature birth of the child with which she was pregnant, *and that the use of said instrument was not necessary to preserve the life of said woman.*

The next case was *Harrod v. United States*, 58 App. D. C. 254, decided in 1928, in which the court in the opinion stated that the defendant was in-

dicted and sentenced for the crime of having unlawfully and feloniously caused and produced a miscarriage of a pregnant woman by the use of certain instruments upon her person which acts were not necessary to preserve her life and health. The indictment in that case charged, so far as material, that one Harrod wilfully and feloniously made an assault upon the said woman who was then pregnant with child, as the said Harrod then and there well knew, and that the said Harrod in making the assault did then and there wilfully and feloniously use a certain instrument, that is to say, a catheter, *and that the use of said instrument was not necessary for the preservation of the life or health of the woman.*

While it is true that the particular point raised by appellant in this case was not passed upon by this court in any of the above mentioned cases, it discloses the fact that should appellant's position be correct, cases have been reviewed and sentences affirmed under indictments, to use the words of appellant's brief, which do not "charge an offense within the statute."

An examination of the statutes of the several states, as set forth in appellant's brief, discloses that those relied upon by appellant contain language different from the statute applicable to the District of Columbia. The only statute which is similar to that in force in the District of Columbia is the Maine statute, where the exception or qualifying provision follows, as in the District of

Columbia, the use of the words "medicine", "drug", "instrument, or means", in which case the Supreme Judicial Court of the State of Maine in *State v. Rudman*, 126 Me. 177-179, held that the exception "unless the same was done as necessary for the preservation of the mother's life" refers to the unlawful act prohibited, namely, the administration of medicine or the use of an instrument. Further, the Maine court held that the evil intent essential to the crime is the same as in the District of Columbia statute, namely, "intent to procure the miscarriage", and that the offense is complete when the act is done with this intent, "unless the act (the administration of medicine or the use of an instrument) falls within the exception." The court in that case further held that the context and phraseology convinced them that the phrase "unless the same was done" finds its antecedent in the unlawful acts enumerated, rather than in the evil intent which must concur. The Maine court referred to cases cited by counsel for the defendant as opposed to this view, and stated that they were based on statutes of other states in which the exception expressly, or by clear implication, "related to the necessity of procuring the miscarriage rather than the means used to that end." In other words, the Supreme Judicial Court of the State of Maine, in construing its statute, which is the only statute similar to the District of Columbia statute, held against appellant's contention, after the same argument was made in that court as is being made

in this court. Appellant is in error when he says on page 73 of his brief, that the Maine statute is "radically different" from the District of Columbia statute, for that "there is no mention whatever of the word miscarriage or abortion." The Maine statute speaks both of intent to destroy the child and intent to procure the miscarriage. More particularly, in the states of Vermont, Indiana, Missouri, Utah, Delaware, Illinois, Alabama, California, Georgia, Kansas, Michigan, Minnesota, Nebraska, Oklahoma, Washington, Nevada, Arizona, Idaho, Montana, Oregon, Tennessee, Rhode Island, Connecticut, and South Carolina, the exception, "unless the same is necessary" follows the word "miscarriage" rather than the administration of medicine or use of instruments and means, as in the District of Columbia statute. The decisions in the nine cases referred to from these states, dealing with statutes of this character, have no application and are not persuasive in a decision in the instant case.

The appellant also cites the statutes of Iowa, Ohio, Colorado, Kentucky, and Wyoming where the qualifying words are "unless such miscarriage shall be necessary to save", or their equivalent, etc. These are likewise obviously inapplicable. The statutes in other states cited by appellant are admittedly inapplicable, although appellant admits that in New York, where the words "unless the same is necessary to preserve the life", etc., follow

the word "miscarriage", the courts of that state have held that it is unnecessary to allege and prove that the miscarriage was not necessary to preserve the life of the woman.

In the states of North Dakota, Mississippi, and South Dakota, the qualifying words, "unless the same shall have been necessary", etc., follow the phrase "with intent to destroy such child" or its equivalent, which is tantamount to saying "with intent to procure a miscarriage", and fall within the same category as the other statutes where the word "same" follows "miscarriage."

The statutes of the remaining states make no mention whatever of an exception of saving the life of the mother or are otherwise inapplicable, as admitted by appellant.

Of course, it should be noted that there are only nine states which have passed on this question, namely, Vermont, Indiana, Iowa, Missouri, North Dakota, Utah, Delaware, Illinois, and Ohio, and in every one the exception, "unless the same is necessary to preserve", etc., follows and qualifies the word "miscarriage" or its equivalent, or the language is "unless such *miscarriage* shall be necessary", or its equivalent. Such decisions, therefore, are neither persuasive nor helpful in a determination of the question raised by appellant. In fact, the decisions of only Vermont, Indiana, Missouri, and North Dakota appear to be definitely on this point.

We, therefore, submit that from the standpoint of context, phraseology, reason, long established practice, a fair reading of the local statute, and tacit construction by this court, the indictment herein properly charges the offense denounced by the statute, and that the language of the indictment negating the necessity for the use of the means rather than negating the necessity for a miscarriage, which relates only to the intent and not the gravamen of the offense, is the only proper way of pleading the qualifying clause. Otherwise, the statute would be narrowed to the completed act of procuring the miscarriage, whereas, as it is now drawn, the offense is completed upon the administration of the medicine or the use of an instrument or means with the requisite intent, unless the administration of the medicine or the use of the means is necessary to preserve the life or health of the woman.

Of course, the foregoing is all aside from the question of whether it was necessary to allege or prove the exception in the statute, that is, the non-necessity for the use of the instrument or means, and if it should be unnecessary to allege and prove the exception, the allegation of the same would be surplusage and the proof thereof immaterial. On this point the following cases are cited:

Cook v. United States, 17 Wal. 173.

Jelke v. United States, 255 Fed. 279.

Queen v. United States, 64 D. C. 301.

That it is unnecessary either to allege or prove the absence of necessity to use the means or instruments or the procural of the miscarriage, as the case may be, is held by the following cases:

State v. Rupe, 41 Tex. 33.

Johnson v. People, 33 Colo. 224, 80 Pac. 133.

Bradford v. People, 20 Hun. 309 (N. Y.).

People v. McGonegal, 17 N. Y. Sup. 147, aff. 136 N. Y. 62, where the question of the negating of the exception was raised.

State v. Nossaman, 120 Kans, 177, 243 Pac. 327.

However, we do not rest upon the foregoing authorities even though some of them contain the excepting clause, as in the statute in the instant case, in the same sentence with the body of the statute charging the offense.

II

There was adequate proof of pregnancy

Mrs. Charlot testified that she had intercourse with some men at various times during January, February, and March (R. 24); that she missed her menstrual period which was due about the 15th of April (R. 16); that she went to the appellant on May 21, when the arrangements were made for performing the abortion; that the appellant examined her and said he believed she was pregnant (R. 18). At this time, of course, she had missed two menstrual periods. Dr. Mandy of Gallinger Hospital

testified that he could reach an opinion from her physical findings alone. He then gave a full statement of the physical findings, and concluded from his examination alone, regardless of history, that Mrs. Charlot had had an abortion. His very full statement of Mrs. Charlot's condition makes it clear that Mrs. Charlot had an abortion and having had an abortion she necessarily had just been pregnant (R. 37-38). The appellant's own records, which he introduced, show under date of May 22, being the date of the offense charged and being the occasion of the afternoon call at the Powhatan, the following entries: "Inevitable abortion apparent". Diagnosis: "eight weeks miscarriage" (R. 50).

As against this testimony there is no evidence to the contrary except the evidence of appellant that he made a mental note that possibly Mrs. Charlot was pregnant and thought he told her that she was possibly pregnant, but that he declined to make a positive diagnosis (R. 59), and the testimony of Dr. Kelley that you can not be sure of pregnancy until you feel the movements and hear the fetal heart, and the testimony of Dr. Bowen that there is no infallible test of pregnancy after a woman has passed her period for a month or perhaps two months. Of course, the doctors were talking about a positive diagnosis of pregnancy; however, the only proof necessary in the instant case is proof beyond a reasonable doubt, not beyond a peradventure of a doubt, and there was sufficient evi-

dence to submit this question to the jury for their determination.

In the case of *State v. Rudman, supra*, the case which construes the Maine statute (which is the only statute similar to the District of Columbia statute), in the manner contended for by the government, the facts are strikingly similar. The woman in that case had sexual relations early in January. She had no menstrual flow in February and on the 12th of February went to the defendant, a physician, and stated to him that she thought she was pregnant. She said he examined her and said she was pregnant and made an appointment for an operation. The following Wednesday she went again to the defendant's office and, after the payment of fifty dollars by the boy whom she said was responsible, an operation was performed. Later she was admitted to a hospital and the surgeon there testified to what he found from his physical examination. The court held that absolute certainty of pregnancy is not and could not be established, but the circumstances are sufficient for the jury to find beyond a reasonable doubt that it existed. The court in this case referred to the case of *State v. Stafford*, 145 Iowa 285, where a woman who had indulged in sexual intercourse and who had missed her menses in December and in January, became convinced she was pregnant and informed the accused. A drug was procured resulting in her serious illness in the latter part of

January and in the first week of February she discharged what resembled a blood clot. The Iowa court held that with no history of prior ill health or explanation of the suspension of her menstrual flow, such evidence was sufficient proof of pregnancy to support a verdict, even though two physicians expressed the opinion that at so early a period it could not be known with certainty that she was pregnant. See also *People v. Browning*, 22 Pac. 784, 790 (Calif.) holding that it is sufficient to prove that the defendant believed the patient was pregnant.

III

The testimony of Doctor Mandy was entirely admissible

Dr. Mandy testified that he could reach an opinion from the physical findings alone and then he testified as to the physical findings, namely, that the patient was acutely ill, bleeding from the vagina, infected, as evidenced by her temperature, pulse, and respiration; that the type of her discharge was the type found with infections in the female genital organs; that it was foul smelling and full of blood clots; that her womb was enlarged and the mouth of it was open, indicating that something had been in the womb and had come out. He testified that from these physical facts he could presume, but could not positively state the cause of her physical condition, and in answer to a question by the court as to whether he formed any

opinion, he stated that he concluded from what his examination revealed and what he determined from the examination alone, regardless of history, that the patient had had an abortion, having seen a certain number of such cases which are all alike, and just from the physical findings he categorized Mrs. Charlot in the same class with many others just like hers.

It is respectfully requested that the court examine pages 35, 36, 37, 38, 39, and 40 of the record containing the testimony of Dr. Mandy which show conclusively that he did not venture into the realm of hearsay as appellant suggests. (*Thompson v. United States*, 30 App. D. C. 352, 358.)

For example, appellant quotes on page 84 of his brief certain portions of the record in which Dr. Mandy was asked whether the condition he found to exist was a spontaneous or an induced abortion, to which there was an objection, resulting in the court asking whether he could answer from his examination, to which the witness responded that he arrived at the conclusion partly from the history on that point, that is, as to whether the condition was spontaneous or induced. Appellant neglects to say that then followed a colloquy between the court and the witness and that this question, an answer to which was to be based partly on history, was never answered.

Upon referring to the answer of Dr. Mandy that his opinion was formed partly upon what Mrs. Charlot told him, appellant neglects to state that

after the extended colloquy between counsel and the court, the witness said that he could reach an opinion from the physical findings alone, but used the history as corroborative evidence, and then proceeded to state the facts as to his physical findings and nothing more, on which he based his opinion.

That part of appellant's brief on this point and other points, wherein appellant comments on the undependability of Mrs. Charlot's testimony, because of the fact that she is "morally in *pari delicto*", are not commented upon because this was a question for the jury.

IV

The court instructed the jury adequately on the question of negating the necessity for the administration of drugs or use of means or instruments

In answer to point four of appellant's brief that the charge the court gave on the question of non-necessity was grossly inadequate and misleading, whether non-necessity refers to the miscarriage or the use of instrument or means to preserve the life of the woman, attention is invited to that part of the court's charge where, in stating the offense, he quotes the statute and includes the words "unless when necessary to preserve her life or health", and next when he paraphrases the statute and states that the law makes it an offense to procure

the miscarriage of the woman whether by the use of an instrument or by the use of drugs or medicine, or by any means "unless it is necessary to preserve her life or health." We submit that it was unnecessary to repeat this statement as to necessity more than twice, and that the charge was not inadequate nor misleading (R. 75).

However, there is respectable authority that this charge of the absence of necessity is not essential. For example, in *State v. Lee*, 37 Atl. 75, 69 Conn. 186, the court held that it was a matter of common experience that the ability to bear and bring forth children is the rule, and that the necessity for procuring an abortion or miscarriage in order to save the life of a mother or child is the rare exception; that the presumption is against such necessity and that the court in the first instance, and in the absence of evidence to the contrary, as here, may rest on that presumption.

In *State v. Montifore*, 116 Atl. 77, 95 Vt. 508, the court cited with approval the case of *State v. Lee*, *supra*, and stated there was much to be said in support of the view, although not necessary for a decision in this case, because the girl was in good health, strong and robust, and working; that inasmuch as the ability to bear children is the rule and necessary abortion is the rare exception, there is presumption against the necessity therefor, which answers the requirement of this rule until

evidence of the necessity comes into the case, just as the presumption of sanity answers until evidence of insanity appears.

In *State v. Longstreth*, 121 N. W. 1114, 19 N. Dak. 268, the court found that in cases cited the presumption obtains that it was not necessary that an abortion should be procured to preserve the life of the female and that such presumption in the absence of proof rebutting the same aids the state in its proof by making out a prima facie case, but held that, in view of the record, the court was not required to adopt the rule, inasmuch as the facts showed that the female was a strong, healthy, working girl. Also compare *Johnson v. People*, 80 Pac. 133, 33 Colo. 224.

However, without reliance on the foregoing decisions, we submit that the court's instructions on this point in charging the jury that they must find an absence of necessity was adequate, particularly in view of the evidence. There was no claim by appellant that this operation was necessary; in fact, he denies that he performed the operation. A few weeks prior to the date of the offense charged, Mrs. Charlot had been working, but had come to Washington when she had lost her position. On the day before the offense charged, appellant examined her female organs and appellant testified there was nothing alarming about her condition except her general condition which was far from healthy. He further testified that he made a vaginal examina-

tion and found a white discharge with a mild streak of blood issuing from the mouth of the womb, but this does not indicate any necessity for the operation in question. Just before the date of the alleged offense, Mrs. Charlot was making purchases and was far from leading the life of a person requiring this operation or treatment to save her life or health. Mrs. Charlot testified that she was not bleeding from the vagina prior to going to see the appellant on the date of the offense charged and that she had not been bleeding previously. On this date Mrs. Charlot arranged for a room at the Powhatan Hotel, made a telephone call, walked to the appellant's office and exhibited none of the symptoms indicating a necessity for the use of instruments or medicines to preserve her life. (Rec. 16, 17, 18, 19, 20, 28, 59, 60.) In view of this evidence, which at least makes out a *prima facie* case of non-necessity, which was not controverted, we submit the court's instruction was adequate.

V

Appellant's discussion of the evidence

No comment is made on this point of the appellant's brief, inasmuch as it is a repetition of points previously made and also is an argument that appellant is innocent. It is of a character that only could be made to the fact finding body, the jury. The question of whether the appellant or the witnesses for the government should be believed has already been passed upon by the jury.

VI

There is no fatal variance between the verdict on the third count and the proof

The third count charged that the defendant did use certain means, the exact nature of which are to the Grand Jurors unknown. Mrs. Charlot testified that the appellant approached the operating table on which she was lying, with a metal instrument eighteen inches long, which he inserted in her and moved in a circular motion. She said that she thought her vagina had been dilated and this indicates that another instrument may have been used (R. 19, 20). She did not know what a catheter was and did not know of ever having seen one (R. 26). She was not certain whether appellant had inserted anything else in her besides the instrument she described (R. 28). The appellant testified that he took a speculum and passed it into the vagina and applied a pair of dressing forceps and swabbed out the vaginal canal. It is possible by this instrument to expand the vagina (R. 42, 43). In view of this uncertainty as to the exact means used, there is no fatal variance between the indictment and the proof when the indictment charges that the means are unknown and the proof shows that such uncertainty as to make them unknown.

VII

There is no legal objection to acquittal under counts one and two and a conviction under count three

Appellant takes the position that having been acquitted under count two, which charged the use of "certain means and instruments", it is impossible for a conviction under count three, which charged the use of "certain means." In other words, as we understand appellant's position, count two embracing "means" makes a conviction under count three, charging only the use of "means", a legal impossibility because of repugnancy and because of former jeopardy.

A short answer to this would be to ask appellant what his position would be if the clerk of the court had called for a verdict under count three before he called for a verdict under count two.

However, the Supreme Court, Federal, and State courts, have passed on this question. In *Dunn v. United States*, 284 U. S. 390, defendant was charged with maintaining a nuisance by keeping intoxicating liquor for sale, unlawful possession, and unlawful sale, each in separate counts; was found guilty on the first and acquitted on the second and third. The defendant contended, as the appellant in this case, that the verdict is inconsistent and, therefore, that he was entitled to be discharged. The evidence was the same for all counts, as in this case. There was evidence of the

sale of whisky on two occasions, there was evidence of possession of whisky, and there was evidence of regular course of business which warranted a verdict of guilty on the nuisance count. The court held as follows:

Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. *Latham v. The Queen*, 5 Best & Smith 636, 642, 643. *Selvester v. United States*, 170 U. S. 262. If separate indictment had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicata of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. As was said in *Steckler v. United States*, 7 F. (2d) 59, 60:

“The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant’s guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.” [Italics supplied.]

In *Borum et al. v. United States*, 284 U. S. 596, under a certificate from this court ~~setting forth~~ that under an indictment in four counts charging

three defendants with murder in the first degree, the first count named one of the defendants, the second count another and the third the last, as having held the pistol with which the crime was committed and the fourth count alleged that the weapon was held by one of the defendants, but that his name was unknown, and that all three of the defendants were found not guilty under the first three counts, but guilty under the fourth, and sentenced to death. The question certified was:

Can the judgment of the Supreme Court of the District of Columbia, based upon the conviction of the defendants on the fourth count of the indictment, be sustained in view of the acquittal of each and all of the defendants of the charge of murder in the first degree as contained in the first three counts of the indictment. The Supreme Court answered the question, "yes." The verdicts were, of course, inconsistent and repugnant, but not legally objectionable.

In *Dealy v. United States*, 152 U. S. 539, the court had under consideration an indictment in seventeen counts charging conspiracy to defraud the United States. One of the counts was not referred to in the verdict. The defendant contended that the indictment amounted to but one count, but one charge of conspiracy, and that an acquittal on one count acquits him of the single offense charged in all the counts. The court held:

But this is obviously a mistake. It is familiar law that separate counts are united

in one indictment, either because entirely separate and distinct offenses are intended to be charged, or because the pleader, having in mind but a single offense, varies the statement in the several counts as to the manner or means of its commission in order to avoid at the trial an acquittal by reason of any unforeseen lack of harmony between the allegations and the proofs. 1 Bishop on Criminal Procedure, Sec. 422. Yet, whatever the purpose may be, each count is in form a distinct charge of a separate offense, and hence a verdict of guilty or not guilty as to it is not responsive to the charge in any other count. Take the case of an indictment for murder. Suppose in one count the homicide is charged to have been committed by means of a blow from a pick-axe, and in another by a shot from a pistol. While from the name of the deceased and the time and place of the killing it may be inferred that the same homicide is in the mind of the pleader, yet such inference is not, as a matter of fact, conclusive, and, as a matter of law, is overthrown by the dissimilarity in the means of the homicide, and it certainly would be a novelty in criminal practice to have a verdict returned upon such indictment, finding the defendant guilty under the one count and not guilty under the other, adjudged a verdict of not guilty as to both.

In *Walsh v. United States*, 174 Fed. 615, the Circuit Court of Appeals for the Seventh Circuit, had

under consideration a verdict of guilty upon fifty-four counts of an indictment charging the defendant with misapplying the funds of a national bank, and on the point here in question the court held as follows:

The objection to the verdict on the ground of inconsistency and repugnancy we do not think is well taken. None of the alleged inconsistencies are substantial, nor of such a character as the law will recognize. A verdict will not be set aside as inconsistent, *because it finds differently as to counts in which there is no material difference.* So long as there is no inconsistency in the verdict as to the substance of the matter charged in the various counts, the verdict will not be disturbed. If the gravamen of the charge in each count, on which there has been a verdict of guilty, is the same, there is no inconsistency in the verdict. If, in contemplation of law, the legal effect of the allegations in the various counts on which there has been a verdict of guilty is the same, the courts will not upset the verdict on the ground of inconsistency, where the only inconsistency is in respect to immaterial particulars concerning the means by which the crime was committed. *Griffin v. State*, 18 Ohio St. 438; *Reg. v. O'Brian*, 1 Brit. Crown Cases, 9; *Hudson v. State*, 1 Blackf. (Ind.) 317; *Hathcock v. State*, 88 Ga. 91, 13 S. E. 959; *Tabler v. State*, 34 Ohio

St. 127; *People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989, 63 L. R. A. 353, 93 Am. St. Rep. 582; *Lyons v. People*, 68 Ill. 271; *Langford v. People*, 134 Ill. 444, 25 N. E. 1009.

By law each one of the counts in a given group is considered to state the same offense, and the gravamen of the offense stated in each count of these groups is the same. In finding the defendant guilty under all the counts in one of these groups, the jury have found him guilty of the same offense under each count. Here the gravamen of the offense was the misapplication of funds, and the method by which this misapplication was accomplished is immaterial. [*Italics supplied.*]

In *Steckler v. United States*, 7 F. (2d) 59, before the Circuit Court of Appeals for the Second Circuit, in an opinion by Circuit Judge Hand, there was plain inconsistency in the verdict in saying that liquors were kept for sale and saying that the shop in which they were was not one in which liquors were kept for sale, and the court concluded that it could not "avoid the question whether the inconsistency invalidated the verdict of guilty." After pointing out that the question has usually arisen where the verdict is, in fact, not inconsistent, the court declined to consider the inconsistency as ground for reversal, and then made the statement quoted in *Dunn v. United States*, *supra*. See also *Tabler v. State*, 34 Ohio St. 127.

It is, therefore, respectfully submitted that the judgment and sentence of the court below should be affirmed.

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